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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

No. ~~271.~~ 31

ANNA M. SIMS, APPELLANT,

vs.

WILLIAM EVERHARDT AND ELIZABETH E. BURSON, EXECUTOR AND EXECUTRIX OF MAGDALENA EVERHARDT, DECEASED, MARGARET DARLINGTON, AND JAMES EVERHARDT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

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a ANNA MARIA SIMS
vs.
WILLIAM EVERHART ET AL. } 2850.

1 Pleas of the circuit court of the United States for the district of Indiana, begun and holden at the United States court-house, in the city of Indianapolis, in said district, on the first Tuesday of November, in the year of our Lord one thousand eight hundred and seventy-six, before the honorable Thomas Drummond, judge of said circuit court, and the honorable Walter Q. Gresham, judge of the district court of the United States for the district of Indiana and ex officio judge of said circuit court.

ANNA MARIA SIMS
vs.
WILLIAM EVERHARDT AND ELIZABETH E. Burson, executors of Magdalena Everhardt, deceased, Margaret Darlington, and James Everhardt. } 2850. Chancery.

Be it remembered that heretofore, to wit, on the 2nd day of November, A. D. 1874, before the Hon. James C. Hopkins, one of the judges of said court, the following proceedings in the above-entitled cause were had, to wit:

2 Comes now the complainant by Mr. Perrin, her solicitor, and files her bill of complaint in the words following:

To the judges of the circuit court of the United States for the district of Indiana, in the seventh circuit:

Anna Maria Sims, of the city of Chicago, and a citizen of the State of Illinois, brings this bill against William Everhardt, Elizabeth E. Burson, and Margaret Darlington, who are all residents of the county of La Porte and State of Indiana, and thereupon your oratrix, a single woman, complains and says that she now is, and on the 28th day of May, A. D. 1847, and prior thereto, she was the owner in fee simple of the following described real estate situate in the county of La Porte and State of Indiana, to wit: The west half (W. ½) of the southwest quarter (SW. ¼) of section thirty-four (34), in township thirty-seven (37) north, of range two (2) west, which is of the value of more than five thousand dollars.

That on the day aforesaid your relatrix was an infant, under the age of twenty-one years, and was then, and for a long time had been,
3 the wife of one John B. Sims, and continued uninterruptedly to be the wife or said John B. Sims from the day of their marriage on the 4th day of July, A. D. 1844, until the 14th day of February, A. D. 1870, on which last-mentioned day she was divorced from him on account of his misconduct.

And your oratrix further shows that on the said 28th day of May, A. D. 1847, and for a long time prior thereto, and during her coverature and minority, her said husband persistently importuned her to sell said land, and upon her repeated refusal to comply with his wishes in that respect he as often used toward her abusive, violent, and threatening language, and often threatened to abandon her, and by reason of said threats and violent words she became intimidated, and feared that if

she continued to refuse his said request to sell said land that he would abandon her or inflict upon her some bodily injury, and your oratrix became weak and broken down in her spirits and power of resistance, and feared longer to refuse to convey said land, or to communicate to
4 the officer before whom the pretended deed for said land hereinafter mentioned was acknowledged, the fact of the influence used to procure the execution thereof, and on the day last aforesaid, and at divers times previous thereto, the said John B. Sims and one Magdalena Everhardt, acting for herself and through her agents, fraudulently combined and confederated with each other for the purpose of defrauding your oratrix out of her said land, she, the said Magdalena Everhardt, and her agents, well knowing that your oratrix was then under the age of twenty-one years, and was acting under the restraint and coercion of her said husband as hereinabove stated, and nevertheless she and her agents used divers persuasions and deceptions for the purpose of inducing your oratrix to sell and convey her said land, and to mislead her as to the effect of her said deed.

And your oratrix further shows that on the said last mentioned day, in pursuance of the combination and confederation between the said John B. Sims and the said Magdalena Everhardt, and by means
5 of the persuasions and deceptions used by her said agents, and by means of the coercion and undue influence of said John B. Sims, your oratrix joined with her said husband in the execution of a certain writing which purports to be a deed of conveyance of the land above described to the said Magdalena Everhardt, a copy of which pretended deed is herewith filed and marked Exhibit A.

That under said pretended deed the said Magdalena Everhardt immediately thereafter took possession of said land and continued to occupy the same until the day of , A. D. 1871, when she died testate.

That by the terms of the will of the said Magdalena Everhardt the said Elizabeth E. Burson and William Everhardt are appointed executors thereof, and the said Elizabeth E. Burson, William Everhardt, and Margaret Darlington are made legatees and devisees to whom is bequeathed and devised all the property of said Magdalena Everhardt, and they are the only persons who have an interest in the real
6 estate of said Magdalena Everhardt, or the proceeds thereof, or in any distribution of any portion thereof, as in and by said will, to which your oratrix craves leave to refer, will more fully appear.

That said executors have caused said will to be admitted to probate and have accepted said trust and entered upon the discharge of the duties thereof, and ever since the death of the said Magdalena Everhardt the said executors and devisees and legatees have been in possession of said described land, and they and the said Magdalena Everhardt have received the rents and profits of said land, and used and occupied the same for their exclusive benefit ever since the day of the execution of said pretended deed.

And your oratrix further shows to your honors that the said Magdalena Everhardt caused said pretended deed to be recorded in the record of deeds of said county of La Porte, and she in her lifetime and the said defendants since her death have asserted title to said land under said pretended deed, and your oratrix says that soon after the removal of her disability by the said divorce from her said husband
7 she demanded of the said Magdalena Everhardt, and since her death of the executors, the possession of said land and gave them notice of her purpose to hold void and of her disaffermance of the

said pretended conveyance, which possession the said Magdalena Everhardt and her executors have at all times refused.

And your oratrix says that said pretended deed and claim of title are a cloud upon her title to said land.

Your oratrix further shows that at the time said Magdalena Everhardt entered into the possession of said land and since that time there was upon said land a dwelling house, fences, and other improvements usually made upon a farm, with a large proportion of said land ready for cultivation, and that the rents and profits of said land during the time it has been in the possession of the said Magdalena Everhardt and the said executors was and is worth about the sum of two hundred and fifty dollars for each and every year, as your oratrix is informed and believes. And your oratrix says that she admits that the said
8 Magdalena Everhardt at the time of the pretended execution of said deed paid to the said John B. Sims the consideration named in the said deed, but she says he appropriated the same wholly to his own use, and that no part thereof was paid to your oratrix.

And your oratrix further admits that the mortgage mentioned in said deed has been paid and discharged by the said Magdalena Everhardt, and upon her account being taken of the rents and profits of said land your oratrix offers to allow to said defendants the amount of said mortgage and interest thereon, and also if it be decreed by your honors that your oratrix is in equity and good conscience bound to refund said purchase money so received by her said husband, then she offers to allow upon such account the amount thereof, and in the event the same shall exceed the amount of said rents and profits, then she offers to pay such excess to the defendants whenever the same shall be ascertained.

Wherefore your oratrix prays your honors that said defendants may be decreed to deliver up the said pretended deed to your oratrix
9 to be cancelled, as having been executed by your oratrix while under the disabilities of infancy and coverature and through coercion and fraud, and absolutely void from the beginning, and that the title to said real estate be quieted in your oratrix.

And may it please your honors to grant unto your oratrix the writ of injunction issuing out of and under the seal of this honorable court according to the form of the statute in such case made and provided, directed to the said defendants commanding, enjoining, and restraining them and each of them from setting up or in any manner claiming any title to or interest in said lands under said pretended deed, or in any way interfering with the rights of your oratrix therein.

And may it please your honors to grant that an account be taken of the rents and profits of said land during the time the same has been held by the defendants and said Magdalena Everhardt, as well as of the amount your oratrix shall be in duty bound to pay on account of
10 said purchase-money and said mortgage mentioned in said deed, and that said defendants be decreed to pay to your oratrix the balance that may be found due her, if anything, upon said accounts, and she hereby offers to pay to the defendants any sum that may be found due to the defendants, and that your oratrix may have such further and proper relief in the premises as the nature of her case shall require.

And may it please your honors to grant unto your oratrix a writ of subpœna of the United States of America, issuing out of and under the seal of this honorable court, directed to the said William Everhardt, Elizabeth E. Burson, and Margaret Dulington, defendants, commanding them on a day certain therein to be named, and under a certain

penalty, to be and appear in this honorable court, then and there to answer all and singular the premises, and to stand to, perform, and abide such further order, direction, and decree as may be made against them.

And your oratrix, as in duty bound, will ever pray, &c.

And afterwards, to wit, at the November term of said court,
11 on Wednesday, the 16th day of December, A. D. 1874, before the honorable Thomas Drummond, one of the judges of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come, now, the parties by their respective solicitors and thereupon the defendants now file their answer to the amended bill herein in the words following, to wit:

To the honorable the judges of the United States circuit court in and for the district of Indiana:

The answer of William Everhardt and Elizabeth E. Burson, as executors of the last will and testament of Magdalena Everhardt and as legatees thereunder, and of Margaret Darlington, in answer to the bill of Anna Maria Sims, filed against them in this cause and court.

These defendants, jointly and severally, now and at all times hereafter, saving to themselves all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections in the said bill contained, for answer thereto, or to so much thereof as these defendants are
12 advised it is material or necessary for them to make answer to, answering, severally, say they admit said complainant is a single woman only as they are informed by her complaint, but otherwise they have no actual knowledge thereof, and they pray that she may be compelled to prove it.

They also admit that on and prior to the 28th day of May, 1847, said complainant was the owner of the land in her said bill of complaint described, but they deny any and all knowledge, information, and belief as to her infancy on that day, except as they are informed by the said bill of complaint, and on the contrary they aver that all the knowledge, information, and belief had on that subject at the date aforesaid was derived from the following paper writing signed by said complainant in the words and figures following, to wit:

"The above-mentioned Anna M. Sims, before the delivery of the above deed and before the payment of the above money or any part thereof, voluntarily and as an inducement to the said Everhardt to consum'ate the bargain, accept the deed, &c., states and declares
13 that she was 21 years of age on the 25th day of September, A. D. 1846.

(Signed) "ANNA M. SIMS."

And the further fact that at that time said complainant was a fully developed married woman, and had the reputation in the neighborhood where she resided of being 21 years of age, and that as a matter of great caution on the part of Samuel Burson, who asked entirely for the said decedent Magdalena Everhardt and as her agent in the purchase of the said land, he caused the aforesaid paper writing to be made and signed by the complainant before he would accept the deed for the said land or pay over to her the money named as a consideration therefor, and

then and there believing the said statement contained in the said paper to be true, and having no knowledge, information, or belief to the contrary, and then and there relying on the truth of the same, he did accept said deed for said land and pay to said complainant the purchase money therefor, as in said paper writing acknowledged, and he would not have done so except on the faith of said statement made and
14 executed by said complainant as aforesaid, all of which was done and performed by the said Samuel Benson as agent for said decedent, and without any actual knowledge on her part, she not being present at the time.

They do not admit the infancy of said complainant, and ask that she may be compelled to prove the same.

They admit that at the time she, said complainant, was the wife of one John B. Sims, and they aver that they have no knowledge, information, or belief as to whether she was divorced from him on the 14th day of February, 1870, except what is contained in said bill of complaint, and they ask that she may be compelled to prove the same.

And answering so much of said bill of complaint as relates to the alleged importunities of the said husband of said complainant to sell said land, they deny any knowledge, information, or belief concerning the same except that contained in said bill, and they therefore deny the truth of such allegations and ask that the complainant may be
15 compelled to prove the same.

And answering as to the alleged threats and abuse of complainant's said husband, they have no knowledge, information, or belief concerning the same except that contained in said bill.

And they deny the truth of such allegations and ask that complainant be compelled to prove the said allegations.

And as to so much of said complainant's bill as alleges her weakness and broken spirit, they deny any knowledge, information, or belief concerning the same except that contained in said bill, and they ask that complainant be compelled to prove so much of her said bill as relates thereto.

And as to so much of said bill as concerns the alleged fraudulent combination and confederation between complainant's said husband and Magdalena Everhardt and her agents for the purpose of defrauding said complainant of said lands, the restraint and coercion of complain-
16 ant's husband, John B. Sims, and the solicitations and persuasions of said decedent, Magdalena Everhardt, to induce complainant to sell and convey said land these defendants severally deny to be true in point of fact, and they deny any knowledge, information, or belief concerning the same except from said bill, and on the contrary aver that, so far as was known to the said Magdalena Everhardt, the complainant acted freely and voluntarily and manifested more anxiety to sell said lands on the date of said conveyance than her said husband did, and all such statements as are set forth in said bill are (as far as known to these defendants) wholly false and without foundation, and they demand that said complainant be compelled to prove each and every of such allegations.

And they aver that said decedent or her agents never in any manner misled said complainant or made any statements relating to said sale or purchase tending to mislead the complainant.

Answering that part of said bill which refers to the deed of
17 conveyance, and the copy thereof, said to be filed with said bill, these defendants admit the execution, acknowledgment thereof, and the delivery to said decedent, but they deny it was so executed,

acknowledged, or delivered under any restraint, coercion, or deception from the said decedent or her agents, and they have no knowledge, information, or belief concerning said acts alleged to have occurred between complainant and her husband, John B. Sims, except as in said bill contained, and they deny the same, all and singular, and demand that complainant be compelled to prove the same.

And answering that part of said bill respecting the possession of said land by said decedent at the time of her death, they admit it as stated.

And answering that part of said bill respecting the will they admit the fact to be as stated in the will, and ask the production thereof on the hearing of this suit, and they deny any statements in said bill inconsistent with its terms, and ask that complainant be compelled to prove any such statements.

18 And answering that part relating to the acceptance of said trust and the occupancy since the death of the said Magdalena, and the receipt by them of the rents and profits, they admit that they have so been in possession and have received the rents and profits, and that said Magdalena had and continued in possession of said lands from the date of the said deed of conveyance until the date of her death, as stated, and that she caused said deed to be duly recorded in said county, and claimed and asserted title to said lands from the day first aforesaid to the date of her death, and during such time occupied said property as her own, free from interruption or adverse claim, and that since her death these defendants have continued in possession, claiming under said decedent.

19 They deny that said complainant in any proper or sufficient manner ever gave notice of her disaffirmance or of her purpose to hold void her said deed of conveyance to said decedent in her lifetime or to these defendants since her death.

A pretended notice was said to be given by one Flagg, an attorney at law, verbally to said Magdalena, the said Flagg being said to be acting as this complainant's attorney in prosecuting an action against these defendants for the recovery of said lands in the La Porte circuit court, which action was afterwards abandoned for want of prosecution by said complainant.

And they aver that any such demand made upon said decedent was informal, illegal, and of no effect, because no entry was made upon said land at the time of such pretended demand, and no sufficient words of disaffirmance were used to convey any such knowledge to said decedent.

And, further answering, they say that more than 23 years had elapsed before the commencement of said action in the said La Porte circuit court and before demand had been made or any notice of disaffirmance of said deed given.

20 That during all that time except for about 3 years the complainant lived within 65 miles of said land and said decedent and these defendants, to wit, in the city of Chicago, in the State of Ill., and since 1852 within 3 hours' ride of said land by the route of the Michigan Southern Railroad Company, and during all of said time, to wit, 23 years, never notified the decedent or these defendants that she had or claimed any interest in said lands, or that there was any defect in said deed or the execution thereof, or of her intention to disaffirm it and hold it void.

And during said time said complainant frequently visited La Porte County, and saw and talked with the decedent and was in her company

and society, but failed to intimate or assert any claims or rights, title or interest, in and to said lands or to disaffirm said deed.

And, further answering, these defendants say that this complainant ought not to have and maintain this suit, because she failed and neglected to commence the same till after two years had elapsed from
21 the alleged date of her divorce from her said husband, to wit, on the 14th day of February, 1870.

That this suit was not commenced until the 16th day of February, 1872, on which latter date the writ of summons came to the hands of the sheriff of La Porte County, Indiana, he being the proper and only person who, by law, could make service upon said defendants, and that the said date of the commencement of this action was more than twenty years after the right to bring the same accrued to complainant, if the same ever did accrue, and more than two years after the removal of the disability under which she was when the same accrued to her. Wherefore these defendants say that the action is barred by the statute of limitations.

Further answering, defendants admit that at the time of the execution of said deed there were certain improvements on said land, to wit, a dwelling house and about 50 acres thereof under fence, and an old and inferior barn, but no other improvements; that the net rental value of said lands during the first 15 years was $150 per year and during the last 10 years $200 per year, and no more, and that the
22 decedent and defendants have received such.

And, further answering, these defendants say that after the execution of said deed, and after the said complainant attained the full age of 21 years, she by her acts and deeds and otherwise confirmed, ratified, and elected to stand by her act and deed, wherefore defendants say complainant cannot have and maintain this action.

And these defendants deny all and all manner of unlawful combination and confederacy as they are by said bill charged; without this, that there is any other matter, cause, or thing in the said complainant's bill of complaint contained material or necessary for these defendants to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, or avoided or denied, is true to the knowledge or belief of these defendants; all which matters and things this defendant is ready and willing to aver, maintain, and prove as this honorable court shall direct, and they humbly pray to be hence
23 dismissed with their reasonable costs and charges in this behalf most wrongfully laid out and expended and sustained.

And it is now here agreed between the parties that the evidence herein shall be closed within 30 days from this date at the expiration of which time this cause shall stand referred to J. D. Howland, master in chancery, who is instructed to take the proofs and report the same, with his finding thereon, to this court with all convenient speed.

And afterwards, to wit, at the November term of said court, on Friday, the 15th day of January, A. D. 1875, before the honorable James C. Hopkins, judge of said court, the following further proceedings in the above entitled cause were had, to wit:

Comes now the complainant, by Messers. Weir and Biddle, her solicitors, and files her replication herein in the words following, to wit:

The replication of Anna Maria Sims, complainant, to the answer of William Everhart and Elizabeth E. Burson, as executors of the last
24 will and testament of Magdalena Everhart, and as legatees thereunder, and of Margaret Darlington, defendants.

This repliavit, saving and reserving unto herself all and all manner of advantage of exception to the manifold insufficiences of the said answer, for the replication thereunto says, that she will aver and prove her said bill to be true, certain, and sufficient in the law to be answered unto; and that the said answer of the defendants is uncertain, untrue, and insufficient to be replied unto by this repliavit; without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in law to be replied unto, confessed and avoided, traversed or devised, is true; all of which matters and things this repliavit is and will be ready to aver and prove as this honorable court shall direct, and humbly prays as in and by her said bill she has already prayed.

And afterwards, to wit, at the May term of said court, on Friday, the 14th day of May, A. D. 1875, before the honorable Walter Q.
25 Gresham, judge of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now J. D. Howland, master, and files his report and finding in in this cause in the words followng, to wit:

The master to whom this cause was referred respectfully submits his report thereon as follows:

On the 3rd day of April, 1845, Hugh Graham, being seized in fee of the land in dispute—80 acres, in La Porte County—conveyed the same by deed to his married daughter, Anna Maria Sims, the plaintiff.

This deed was made subject to a mortgage to the State for $400.

May 28th, 1847, the plaintiff, joining with her husband, John B. Sims, conveyed the same land, for the consideration of $1,300, to Magdaline Everhart, subject to the same mortgage to the State for a loan out of the surplus revenue fund for $400, and one year's interest in arrear.

This deed was duly subscribed by the plaintiff and her husband, in the presence of Samuel E. Williams, and was acknowledged in regu-
26 lar form and delivered on the day of its date. It is not disputed that the price was paid.

Without any statement of the evidence, I report that it conclusively establishes that on the 28th May, 1847, the plaintiff was under 21 years of age. If human testimony can establish anything, she was born September 25th, 1828.

Magdaline Everhart went into immediate possession; she paid to the State the debt for which the land stood mortgaged, $456; she paid taxes and made improvements until the date of her death, October, 1871. By her will, duly executed and probated Nov. 13th, 1871, the defendants, William Everhart and Elizabeth E. Burson, were named executors, and to them, as children of Magdaline, with their sister, Margaret Darlington, the land, with the other property of the testatrix, was devised. They hold it to this day, and have continued to pay taxes and to improve the property

The improvements, clearing ground, fencing, building, repairing,
27 digging wells, &c., were open and notorious, and were lasting and valuable. I do not state any account of the moneys paid and improvements on the one hand, and of the rents and profits on the other. The view I have taken of the case renders such an account unnecessary.

On the 10th February, 1872, the complainant filed her complaint

against the defendants in the circuit court of La Porte County. The process drawn up by the clerk was sealed on the same day. The service on the defendant Everhart was made upon the 25th day of February, 1872, and later upon the others. The cause was afterwards transferred into this court, and docketed as a cause in chancery. A bill of complaint was here filed Nov. 2nd, 1874. It sets up the title of the complainant; charges that she was an infant when the deed of May 28th, 1847, was executed; that she was importuned to sell the land by her husband; that her nonage was known to the testator of the defendants who conspired with the plaintiff's husband to cheat her out of the land, and prays an account of rents and profits (offering to refund out
28 of them the consideration money and that paid on the mortgage), and for surrender and cancellation of the deed, decree quieting herewith and restoring her possession.

At the date of the deed whose validity is questioned Mrs. Sims, with her husband and children, was living at the town of La Porte. Although not of full age until Sept. 25th, 1849, she had been married since July 14th, 1844; was a mother, and was of such appearance that she might readily have been taken for over 21; indeed, was regarded by many who knew her as of full age.

At the time of the purchase, and before the delivery of the deed or the payment of the purchase money, it occurred to Mr. A. L. Osborne, then as now a practicing lawyer of La Porte, to suggest to the agent who acted on behalf of Mrs. Everhart to assure himself that Mrs. Sims was of age. The result of this hint was that Mrs. Sims with her husband came to Osborne's office and there, upon the face of the deed, the declaration following was written:

"The above-mentioned Ann M. Sims, before the delivery of
29 the above deed, and before the payment of the above money or any part thereof, voluntarily, and as an inducement to the said Everhart to consummate the bargain, accept the deed, &c., states and declares that she was twenty-one years of age on the 25th day of September, A. D. 1846.

"Signed May 28th, 1847, in presence of Sam'l E. Williams.

"ANN M. SIMS."

Mr. Osborne had filled up the deed and written the declaration above set forth before the execution of either; and after Mrs. Sims had been told that question was made about her age, and instructed that her deed if she was not 21 would be void, she declared she was of full age, and gave the date at which she became so.

There are several defences, and a number of questions have been raised at the hearing; these defences are:

1st. That the only disability of the plaintiff when this deed was made was infancy. Therefore, the deed was not void, but voidable merely, and that a disaffirmance of the act must be made within a reasonable time after disability removed; and this was not done.

2nd. The statute of limitation.

30 3rd. The effect of the solemn declaration of the plaintiff that she was of age, made to induce the acceptance of the deed and the payment of the money, is in the nature of an estoppel.

1st. As to the ground of defence, I can only say that a recent decision of the supreme court of Indiana, fully stating a case in which a deed had been made by an infant feme covert who joined with her husband in the regular statutory form of acknowledgement was not a void instrument, but that it was voidable at her election when disability was

removed. And that in such a case disaffirmance was indispensable within a reasonable time.

This case, the most recent upon the subject, which appears to have received the careful examination of the bench, and is elaborately argued, does not clearly state the nature of the disability under which an infant married woman is placed, nor the circumstances which set her free from it. It is, of course, implied very strongly that the only
31 disability is that of infancy, and the principle, though not the language of the opinion, would seem to be that as a married woman having joined with her husband in the statutory form of acknowledgement the law is so far complied with, and the defence of coverture is gone; infancy therefore remains the only defence. But if infancy is the only defence, that disability was ended as to Mrs. Sims on the 25th Sept., 1849; she then, on this theory, had 2 years in which to disaffirm in the first place, and in the second place to bring her action. During all this period, however, she was a married woman, under the control of her husband, bound to follow him where disaffirmance would have been impossible, and from the very nature of her dependent relation unable to commence or prosecute her action.

It is very certain that Mrs. Sims did nothing whatever within the two years following Sept. 25th, 1849, that looked towards the recovery of this land, so far as appears in the evidence.

I do not pursue this topic farther and make no finding under this issue.

32 2nd. As to the statute of limitation, it proceeds upon the theory of the defence that the disability was certainly removed on the divorce of John B. and Anna Maria Sims. They were divorced February 14, 1870. The statute allowed two years after the removal of the disability, or until Feb. 14, 1872. The statute made the issuing of the process the commencement of the action. The complaint was filed Feb. 10, 1872. The process was prepared and sealed at once, but was not served until the 24th or 25th. When was it delivered to the sheriff? Was actual delivery necessary? These are the questions which have been seriously contested. I find that the process was brought directly under the eye of the sheriff at the moment of its sealing, and that it was placed in the depository in the clerk's office which had been designated by that officer, and whence he and his deputies had habitually taken the process issued by the clerk. There is, I think, no foundation for this defence.

3rd. Estoppel. The evidence is already sufficiently referred to
33 with regard to the circumstances immediately attending the making of the deed. Mrs. Sims was indeed a minor, and her deed and its delivery, taking the lowest view, were voidable acts, and at some uncertain future it would be in her power to avoid them and reclaim her property. But she does more than this, she declares in the most solemn manner, when she cannot say she is under coercion of her husband, when she is protected by the presence of others, and when she is fully advised of the effect of a deed made by an infant, that she is of full age, and fortifies the statement by the added untruth that she came of age on a particular day which she names.

She does more than this; she remains some time afterwards in the neighborhood—a year or so—and never communicated the fraud to Mrs. Everhart. She knows that she has taken possession; that there is an incumbrance that she will probably pay, and for a year she is silent. Is it possible to believe that an honorable woman was so incessantly under terror of her husband that during a year she could not have in-

formed those she had thus defrauded of the imposition practiced
34 upon them?

And more than this; although she was not divorced until February, 1870, the evidence of her own daughters clearly shows that she was practically separated from her husband probably as early as 1863; certainly not later than 1865. All this time she was silent. During the period that elapsed after her departure from La Porte she was there at least twice. Much of the time she had lived at Chicago, some 60 miles away, and, if she could not visit La Porte, the mails were as free to her as to any one. It would be incredible that she had never heard of the old place and of the improvements made there by the purchaser.

Now, under what circumstances does she come into court asking relief? She has committed a fraud by which she has enabled her husband to get $1,300, and to pay off a debt of $450. Married women are not protected in the commission of fraudulent acts. They are liable for such acts. Either as married woman or infant, when she made the false representation by which Mrs. Everhart was choused out of
35 her money, if this action can be maintained, she was liable at law for her tort.

Yet she comes into a court of equity under all these conditions fatal to success and asks for relief on grounds of strict law. She has secured the money of the testatrix by falsehood and kept silence for years, after no pretence of practical disability could be made, while many hundreds of dollars were spent in improvements on the land, and now asks a chancellor to restore her this land.

The plaintiff insists that it is unfair to make head against her on the ground that this is an equitable proceeding, saying that the complaint was originally in the State court, where under the statute abolishing the destruction between actions at law and in equity there could be no such grounds assumed by the defence. The answer to this is that in the State courts in the forms of law and equitable proceedings are alike, but equitable principles are not abolished.

This case was docketed in this court upon its equity side. It cannot be said that it would have been improperly docketed had it been
36 placed on the law side of the court. But this direction of the cause was accepted by the plaintiff, and a bill in chancery was filed in which a fraudulent conspiracy was charged against Mrs. Everhart, the testatrix of the defendants, and equitable relief was sought; that is, that the cloud should be cleared from the plaintiff's title, the deed of May 28th, 1847, given up and cancelled, an account taken of rents and profits, and possession of the land awarded.

But I think this point is comparatively unimportant. Had this been an action of ejectment is it possible that a party who has a clear equitable defence cannot be admitted to make it? Can an advantage be gained by one who seeks to recover in the face of a plain defence of fraud upon the ground that the fraud afforded an independent cause of action? (Carpenter v. Carpenter, 39 Ind., 142.)

In such a case a chancellor would readily find means by a perpetual injunction to stay proceedings at law, where the equitable defence could not be directly enforced.

37 I advise a decree for the defendants and that the bill be finally dismissed with costs.

J. D. HOWLAND, *Master.*

Index and memorandum of evidence for plaintiff.

Depositions of Anna M. Sims.

This is the plaintiff. As this is an action against an "administrator or executor" concerning a transaction with the testator, objection was made to the admission of the plaintiff's deposition. The statute of Indiana excludes it absolutely. The act of Congress limits the exclusion to testimony as to "any transaction with or statement by the testator, intestate," &c. (Stat. at L., v. 13, p. 533,)

Accepting this as the rule, the master received the testimony of the plaintiff as to her age, and rejected the residue as relating to the transaction involved in the suit.

To this the plaintiff reserved the exception.

Diana Wright.

Harriet Craig.

Zelotas Perrin.

Sylvanus Dorlin.

Wm. E. Lay.

38 H. G. Foyden, contained in transcript from La Porte County.

Daniel M. Graham, in same.

Louisa M. Lord.

Josiah W. Graham.

On disaffirm'ance, James W. Flagg, W. B. Biddle.

And here was introduced transcript of suit brought by Flagg (att'y) April, 1870, in Laporte circuit court, marked A.

On time of divorce, R. R. Stephens.

Rents and profits, Michael Brand, Isaac B. Coplin.

Copy of will of Magdaline Everhart. Agreed that it was probated and executors qualified prior to February, 1872, marked B.

Stipulation as to title and with deeds, marked C.

For defendants. A. L. Osborne, as to declarations of plaintiff at making of deed and his draft of them on the deed. Original deed marked D.

Agreed that this declaration on deed was not recorded with the record of the deed. S. E. Williams, attesting witness.

Stipulation as to mortgage and date of its payment by Mrs.

39 Everhart, marked E.

Same as to payment of taxes from 1847–1872, marked F.

Same to value of land, &c., marked G.

Geo. C. Dorland, recorder, identifying papers. And with his dep., copy of mortgage to sinking fund.

John C. Darlington: Improvements.

Danl. L. Brown: When was suit commenced by Flagg in Laporte C. C.?

Joseph B. Lewis, George Colwell, Jesse H. G. Coplin, James Jack, as to age.

Plaintiff, rebutting: James H. Shannon, clerk Laporte County, on same point—commencement of suit.

J. D. Howland.

And at the same time said master files the evidence taken before him.

And afterwards, to wit, at the May term of said court, on Wednesday, the 9th day of June, A. D. 1877, in recess of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the complainant, by Mess. Weir and Biddle, and A.
40 D. Rich, her solicitors, and files her exceptions to the report of the master herein in the words following, to wit:

Exceptions taken by said complainant, Anna M. Sims, to the report of J. D. Howland, master in chancery, to whom said cause has been referred, &c., said report having been filed herein May 14th, 1875.

1ST EXCEPTION.—For that the said master rejected the entire evidence of the plaintiff, except only that as to her age.

The transaction was not with the testatrix personally; if alive, she could testify to nothing in reference to it.

The transaction was with the agents of the testatrix, one of whom (Osborne) appears in this case, both as counsel for the defendants and as a witness against the plaintiff in regard to the transaction. We insist that neither the letter nor the spirit of the law referred to by said master warrants the exclusion of the plaintiff's evidence.

2ND EXCEPTION.—The said master does not correctly report the facts in stating that, May 28th, 1847, plaintiff joining with her husband conveyed the land in controversy, &c., nor in speaking of the paper
41 so signed as a deed duly acknowledged, delivered, &c. The language is doubtless used inadvertently. We insist that the alleged document bearing that date was absolutely void for want of any statutory power or capacity in the plaintiff at that date to execute or deliver a deed of her separate real property. She being then, according to the finding of the said master, a minor, feme covert, and the property her separate estate.

Nor under such circumstances can plaintiff be held to have consented to the payment of the consideration by Mrs. Everhart, the pretended grantee, nor to the receipt thereof by her husband, Mr. Sims, nor to the possession taken by said pretended grantee. We insist that the master, having found that the property in question was the separate property of the plaintiff, then an infant feme covert, his conclusion therefrom, so far as the plaintiff is concerned, should have been that no deed thereof was ever in fact executed or delivered by her, nor any valid conveyance made.

3RD EXCEPTION.—For that said master in said report finds the
42 plaintiff guilty of fraudulent conduct and false representations at the time said pretended deed was executed, and that this in connection with her subsequent conduct, prior to the time of her discoverture, operates by way estoppel in pais. We insist there is no evidence to warrant such finding. The master having found she was a married woman she is presumptively under the influence and coercion of her husband while her coverture continues and is not responsible for the alleged fraudulent acts. Being also a minor at the time of the legal presumption is thereby strengthened.

Besides, the evidence of the plaintiff shows conclusively the vigorous exercise of coercion by her husband. The evidence of Major W. B. Biddle shows such coercive influence in continued activity down to the time, or nearly, when the coverture ceased. If there was any fraud, actual or constructive, in the transaction, we insist that it was wholly on the part of the agents of Mrs. Everhart, combining with the husband of plaintiff to either coerce or entrap the plaintiff into subscribing a false statement upon the alleged deed. We except to the master's
43 statement of facts, to his charges and findings of fraud and to his

arguments and conclusions therefrom, to all as being unfair and unwarranted.

4TH EXCEPTION.—For that said master finds, and so states, that the improvements made upon the land in question since the pretended execution of a deed thereof by the plaintiff and her late husband were lasting and valuable, stating in one place that many hundreds of dollars were spent in improvements, while no reference is made to the rental value of the land. We insist that such statement is one-sided and partial, and is not warranted by the evidence that no permanent and valuable improvements have been made; that a fair construction of the evidence on this point would be that only a small portion of the nett profits derived from the land were expended thereon; the farm has only been kept in decent order and the buildings in decent repair with a view to such profits; and that the evidence taken together clearly shows that the rental value of the land since in the possession of the defendants or Mrs. Everhart far exceeds the value of all improvements or repairs made by her or them.

44 5TH EXCEPTION.—For that said master's report as to this cause being on the equity side of the court, and the plaintiff's agency therein, is incorrect. The cause is here on motion of the defendants. Still we are not disposed now to complain or to find fault with the jurisdiction of the court. We do not see how equity can impart any vitality to the void deed of an infant feme covert. Nor can we understand why equity should not as jealously protect the absolute rights of a married woman in her separate property as it protects her dower in the property of her husband.

6TH EXCEPTION.—For that said master advises a decree for the defendants, and that the bill will be finally dismissed. We insist that upon the evidence submitted to the master the plaintiff is entitled to the relief asked.

Wherefore the said plaintiff excepts to the said report, and appeals therefrom to the judgment of this court.

And afterwards, to wit, at the November term of said court, on Monday, the 27th day of December, A. D. 1875, before the honorable Thomas Drummond and the honorable Walter Q. Gresham, judge
45 as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come again the parties, by their respective counsel, and the exceptions to the master's report are now submitted and argued, and the court being advised in the premises, doth now sustain the said exceptions to so much of the said report of the master as finds that the complainant was estopped by the declaration in writing made by her upon said conveyance, and also to so much of said report as finds that said complainant had not in due time disaffirmed her said conveyance.

And afterwards, to wit, at the November term of said court, on Wednesday, the 14th day of February, A. D. 1877, before the honorable Thomas Drummond and the honorable Walter Q. Gresham, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

This cause having been further argued by the counsel of the respective parties, and the court being now sufficiently advised, it is ordered that the last part of the order made in this case on the 27th
46 day of December, 1875, as to the disaffirmance of the said plaintiff, be set aside, as not having been found by the master in his

report; and the cause having been submitted to the court upon the pleading, evidence, and the report of the master, and it appearing to the court that the said plaintiff had not disaffirmed the deed made by her on the 28th of May, 1847, referred to in the pleadings, within a reasonable time after arriving at her majority; and the court being satisfied that the rule is established in this State that she must have so disaffirmed the said deed, notwithstanding her coverture, the court finds the equities with the defendants, and dismisses the plaintiff's bill of complaint at her costs.

It is therefore ordered and decreed that the plaintiff do pay to the defendants their costs herein wrongfully expended, taxed at $

All which is finally ordered, adjudged, and decreed.

And thereupon the plaintiff, by counsel, prays her appeal bond to the Supreme Court of the United States, which is allowed upon her filing bond to the satisfaction of the court.

47 And afterwards, to wit, at the November term of said court, on Monday, the 26th day of March, A. D. 1877, before the honorable Walter Q. Gresham, judge of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the complainant, by counsel, and presents her appeal bond in the penal sum of $500, with D. M. Graham, A. D. Rich, W. B. Biddle, and M. S. Weir, as sureties, and said bond being examined is now approved and ordered to be filed.

PLAINTIFF'S TESTIMONY.

Depositions of Anna Maria Sims and William B. Biddle.

Depositions of Anna Maria Sims and William B. Biddle, witnesses produced and sworn before me, Sylvester M. Millard, a notary public in and for the county of Cook and State of Illinois, at the city of Chicago, in said Cook County, State of Illinois aforesaid, on the
48 eighth day of January, A. D. 1875, pursuant the enclosed notice hereto attached.

These depositions were taken on the part of the complainant in a certain action now pending in the United States circuit court, district of Indiana, in the State of Indiana, on the chancery side thereof, wherein Anna Maria Sims is complainant, and William Everhart and others are defendants.

The said ANNA MARIA SIMS, being duly sworn to testify the truth, the whole truth, and nothing but the truth relating to said cause, deposes as follows:

Examined by A. D. RICH, esq., counsel for the complainant:

Interrogatory 1st. What is your name, age, occupation, and present place of residence?

Answer. My name is Anna Maria Sims; born 25th of Sept., 1828; I am a nurse; I reside at Price Place, No. 5, city of Chicago, State of Illinois.

Int. 2nd. Are you acquainted with the parties to this suit? The complainant is Anna Maria Sims, the defendants are William Ever-
49 hart, Elizabeth E. Burson, and Margaret Darlington; the said Everhart and Burson being executors of the last will and testament of Magdalena Everhart.

Ans. 2nd. I am acquainted with Burson slightly. I have seen them a few times. I am the complainant.

(The defendants object to the witness testifying in this suit on the ground that she is a party, and the further ground that Magdaline Everhart, the person to whom the conveyance was made, is now dead.)

Int. 3rd. Did you ever reside in Laporte County, Indiana? and, if so, state when, or about when, you commenced your residence there.

Ans. 3rd. I have resided there. I think my family removed to Laporte County in the year 1835 or '36, about that time, and I went with them.

Int. 4th. Did you ever own any land in Laporte County, Indiana? and, if so, state by whom it was conveyed to you.

Ans. 4th. Yes; I did own some land there. It was conveyed to me by my father, Hugh Graham.

Int. 5th. How much land was there; where or about where was
50 it located? Give the description as near as you can. Was it the same land described in the bill of complaint?

Ans. There was eighty acres of land. It was located about four miles east or a little southeast of Laporte. I think it is the same land described in the bill of complaint in this cause.

Int. 6th. Were you ever married? and, if so, state when, where, and to whom.

Ans. I was married the fourth day of July, 1844, at my father's house in Laporte County, Indiana, to John B. Sims.

Int. 7th. Where did you reside immediately after your marriage?

Ans. 7th. I lived two years at my father's house; I moved in my own in the spring of 1846.

Int. 8th. I call your attention now to a copy of the record in La Porte County, Indiana, of what purports to be a deed, dated on the 28th day of May, 1847, from John B. Sims and Anna Maria Sims, his wife, to Magdaline Everhart purporting to convey the property described in the bill of complaint. Will you please state fully, according to your best recollection, the facts and circumstances under which this docu-
51 ment was executed, if executed. State all the facts immediately preceding and attending the execution of it.

Ans. I commenced living on the property in the spring of 1846; that was the spring that father went to California, and from the time that father went away he wished to leave the place. My father told me that we should never sell the place until ' gave us permission to do so. He gave me the place for taking care of four little children he left in my care when he went to California. And the year following the departure of my father to California I lived in perfect torment because he, Sims, insisted to sell the place. It was through his ill-treatment that I got so that I did not care about anything. I didn't think what I was doing. Of course he used every threat any man could use. He got so that he would come in and just as leave as not knock me down. I got so that I was afraid of him. He always said that he would sell the place whether I wanted to or not. He used every influence over me that he could. At that time he also threatened to leave me. I knew nothing about any arrangement being made to sell the property till the deed was brought in for me to sign. There
52 came in three gentlemen; I think Mr. Burson was one of them; I am not sure who they were, for I didn't know them at that time. He, my husband, asked me if I would sign the deed. At that time just a look from him would make me do most anything. I signed the deed.

Int. 9th. Had you prior to or at that time said anything to your husband, or to any other person, about your desire to consult with or hear

from your father before disposing of the farm? and, if so, state as near as you can recollect what was said on that subject.

Ans. I never had but one letter from him, my father, and that was dated from Independence. He was starting then for California. I always spoke to him, my husband, about waiting to consult with my father. I don't know that I spoke to him about it just at that time, of the execution of the deed, but had previously. He was always worrying me about selling the farm.

Int. 10th. Please state generally what was the effect upon you of the worrying and the threats by your husband, of which you have spoken in the reference to the execution of the deed of the property.

53 Ans. 10th. I was in a very weak state—in poor health, suffering from a nervous debility and scrofula. I had no health for three or four years afterwards. After I moved to Milwaukee I never moved out of my bed for eight months.

Int. 11th. State what was your exact age at the date of the deed, the 28th day of May, 1847.

Ans. I would have been nineteen years old the 25th day of September following.

Int. 12th. Please state what are your means of knowledge as to your age?

Ans. Father had a family Bible that all our ages were in. When any was born I always put the date of their births in it. Father, after my mother's death, gave me all the things, including the Bible.

Int. 13. State whether or not you have frequently looked at and consulted the record of the family births, and in whose handwriting it was.

Ans. I have frequently looked at the record. It was in my father's handwriting including my own; that is, the first part of the record, including the record of my own birth. After we were married, Mr.

54 Sims copied from the family record the date of my own birth and of others of the family on a record and had it framed and hung up in the house. I have frequently seen that record also.

Int. 14. Have you any doubt as to your age?

Ans. Not the least.

Int. 15. What has become of this family record and the copy thereof, to which you above referred?

Ans. The Bible was lost with all our family books in moving to Milwaukee afterwards. The record made by Mr. Sims, of which I have spoken, was lost after I moved to Chicago. I had a difficulty with Mr. Sims in Chicago and left him temporarily. When we afterwards went to living together I could not find this record. In my absence he had disposed of all our household property, including the record, and I could never ascertain from him what became of it or the other property, though I have frequently asked him. He would never give me any information.

Int. 16. Have you ever been divorced from Mr. Sims? and, if so, state at what time, and where.

Ans. I was divorced in Chicago, the 14th day of February, 1870.

Int. 17. Did you, yourself, receive any part of the consideration,

55 if any was paid, for the deed above mentioned, of yourself and husband to Magdaline Eberhart? If so, state fully how much you received; if not, state what became of the consideration, if any was paid, so far as you know.

Ans. I never received any of the money to my knowledge; there might have been some used in the house, but I can't say that there was. The greater part was used by Mr. Sims in gambling and betting on horse-racing, and squandered in that way.

Int. 18. Was it so used by him by your consent?

Ans. No; he asked me no question about it.

Int. 19. How long did you reside in Laporte County, Indiana, after the execution of the deed above mentioned?

Ans. About a year and a half.

Int. 20. Where have you since resided?

Ans. I moved from Laporte to Milwaukee, Wisconsin; I lived there about two years; I came from Milwaukee to Chicago, Illinois; I resided in Chicago until 1856, and then I went to F't Madison, Iowa; staid there till 1861, then I returned to Chicago, and have resided here ever since.

Int. 21. Did you ever commence legal proceedings prior to the
56 present proceedings for the recovery of the land in question; and, if so, who was your counsel in those proceedings?

Ans. I did; it was in the spring of 1870. My counsel was James M. Flagg.

Int. 22. State, if you know, what was the result of those proceedings.

Ans. I don't know.

Int. 23. Do you know why the suit was dismissed?

Ans. I don't know. Mr. Flagg gave me no reasons.

Int. 24. Were you personally informed by Mr. Flagg or any one else that security for costs was required in that case?

Ans. He spoke to me something about it in the summer or spring of 1870; I think it was in June. I was notified by Mr. Flagg to go to Laporte to attend court in the spring of 1870, and I went to the depot to meet him there as he had proposed, but he failed to meet me. I then went to his office, but failed to see him.

The cross-examination is taken conditionally: that if it is held that the witness is competent to testify in the action, then the cross-examination is to be received, otherwise not:

57 Cross-int. 1. Where were you living at the time you signed this deed, the deed to Mrs. Eberhart?

Ans. I was living in Laporte.

Cross-int. 2. Who was living on the farm in controversy?

Ans. He had rented it to Henry Sims, his brother.

Cross-int. 3. At what house, room, or office was the execution of the deed made by you?

Ans. At my own house. It was right opposite of the court-house.

Cross-int. 4. Was the name of one of the men that came L. E. Williams?

Ans. I diden't know him.

Cross-int. 5. Did you at that time know Judge Andrew L. Osborn, who was then a practicing lawyer in Laporte?

Ans. I did not.

Cross-int. 6. Do you remember of going to a lawyer's office in Laporte before the deed was delivered to Mrs. Eberhart and there talking about the deed and your age and matters connected therewith?

Ans. I never was to a lawyer's office in Laporte to my knowledge. I never saw Mrs. Eberhart to my knowledge.

Cross-int. 7. Had you any children living at the date of the execution of this deed?

58 Ans. I had my oldest daughter, about a year and a half old at the time.

Cross-int. 8. What was the date of the birth of your next child?

Ans. She was born in March 7th, 1849.

Cross-int. 9. What became of the four children which you were to maintain and support in consideration of the conveyance of the land in controversy to you?

Ans. There is two of them dead and there is two of them living.

Cross-int. 10. Where did they live after you sold this land?

Ans. They lived with me in Laporte, and resided with me till they were married; they were my sisters; the two brothers died.

Cross-int. 11. How often have you been to Laporte since you left there in 1848 or '9?

Ans. I have been but twice to Laporte since I left there.

Cross-int. 12. State, as near as you can, when that was each time.

Ans. I was there five or six years after I left Laporte for Milwaukee, on the occasion of my sister's death. The second time was seven or eight years ago.

Cross-int. 13. How long were you there each time?

59 Ans. I think it was three days I was there in the first place and a day and a half the second time; on both occasions I went on account of sickness.

Cross-int. 14. In what part of the county were you at each of these visits?

Ans. I was not out of Laporte City.

Cross int. 15. You state that your husband constantly worried you about selling this land, and that he was somewhat violent, and that you were averse to selling the land. Who, if anybody, did you speak to about those circumstances at that time?

Ans. I had no one; I never spoke to any one about it; I had no relative at Laporte at the time; my relatives were about nine miles from Laporte; I had only one cousin there.

Cross-int. 16. You may now state if you were present when the money was paid for the land.

Ans. I was not.

Cross-int. 17. Did you ever ask your husband for the money or any part of it?

Ans. I ought to have stated that he promised me if I would sign the deed he would use the money to buy property in Laporte; that was

60 the promise he made to persuade me to sign the deed; but never had any of it. He never laid out a cent of the money for Laporte property or my comfort either. I think I asked him for the money. Of course I am sure that I asked him for the money.

Cross-int. 18. What did he say to you when you asked him for the money?

Ans. He made answer that he would lay it out to suit his own purposes.

Cross-int. 19. What did you want with the money when you asked him for it?

Ans. I wanted him to buy a house in Laporte so that we could have a home.

Cross int. 20. What did you say to him when you asked him for the money?

Ans. I asked him if he wouldn't do as he had promised; if he wouldn't lay out the money to a good purpose.

Cross-int. 21. Then you asked him to buy a house and lot instead of asking him for the money, did you not?

Ans. Well, I don't remember what was said on the occasion, it is so long since, or how it was worded.

Cross-int. 22. Then of course you have no distinct recollection whether you asked him to carry out his promise or to give you the money?

61 Ans. I asked him for both, of course.

Cross-int. 23. Now, Mrs. Sims, will you please state, if you asked him for the money, in what way you asked him for it?

Ans. Of course I couldn't state how I asked him for it.

Cross-int. 24. Why, if you asked him for the money and have a distinct recollection of asking him for it, why haven't you some recollection as to the how or the manner of your asking him?

Ans. I had a great desire after he got the money that he should lay it out on a house for those little brothers and sisters of my own.

Cross-int. 25. Is not your recollection of asking him for the money interwoven with the further fact of the promise he made you to buy a house for you in Laporte, and is not your recollection predicated on the fact that you desired him to carry out that promise?

Ans. I think I urged him to give me the money and let me use it myself if he would not use it in that way. We had a great deal of trouble over the matter.

Cross-int. 26. I understood you to say, Mrs. Sims, that you
62 finally consented to sign the deed on the promise made by your husband to buy you a house in Laporte; is this correct?

Ans. This was talked of before when he was thinking of selling the place, and I knew nothing of the selling of it till he brought me the deed to be signed; and at that time, if he ever looked at me, I would have done anything he told me to do—I was in such fear of him.

Cross-int. 27. Now will you please answer the former question?

Question 26 reread.

Ans. It is not correct, because it was talked of before. It was talked of in that way when he was thinking of selling the place. I knew nothing about him selling the land until they were all brought into the house.

Cross-int. 28. Who was the first attorney and counseller at law that you talked with in reference to bringing a suit for the recovery of this land?

Ans. I think that Mr. Biddle was the first one that was consulted about it. Mr. Flagg was the first one that I consulted about it.

63 Cross-int. 29. About when was this. Give the date as near as you can.

Ans. I couldn't say. It was the year before the bill of complaint for a divorce was filed.

Cross-int. 30. Was your consultation with Mr. Flagg or the consultation with Mr. Biddle, respecting the recovery of this land, before or after the filing of this bill for a divorce?

Ans. It was before.

Cross-int. 31. Who was your attorney in prosecuting your suit for a divorce?

Ans. Mr. Flagg.

Cross-int. 32. Is it the same Mr. Flagg that commenced your first action to recover this land?

Ans. It was.

Cross-int. 33. You may state whether the fees of your present solicitors is in any degree dependent upon the result of the recovery of the land in this suit.

(Complainant's solicitors advised the witness that she is at liberty to

refuse an answer to the question and all similar questions on that subject.)

Ans. I refuse to answer by advice of my counsel.

(If the defendants are entitled to an answer to this question
64 and similar questions on that subject, notice is now given that a resort will be had to the known practice in such cases to compel an answer. By defendant's counsel.)

Redirect examination by A. D. RICH, counsel for plaintiff:

Int. 1. Will you please state whether, at the time of the execution of the deed to Magdaline Eberhart, you executed or subscribed any other writing or paper declaring in substance that you were twenty-one years of age on the twenty-fifth day of September, A. D. 1846?

Ans. I never did to my knowledge.

Int. 2. If you subscribed to any such writing upon the deed or elsewhere, state whether or not the same was read to you or whether or not you knew the contents thereof at the time.

Ans. There was never anything read to me at that time, nor neither did I know the contents of such a paper if I did subscribe such a paper.

Int. 3. Are you aware of ever having subscribed such a paper at the time of or prior to the execution or date of said deed?

65 Ans. I never did to my knowledge. I am not aware of having subscribed such paper.

Int. 4. Will you please examine the paper markes as Exhibit No. 1, hereto attached, and state as to the truth or falsity of the statements therein contained.

Ans. I have heard the exhibit read. The statements therein contained, I should say, are false. I was not twenty-one years old at the date of that paper or exhibit, or at the date of the deed. I have stated my age correctly previously in this examination.

Recross-examination by W. H. CALKINS, counsel for defendants:

(This cross-examination is taken conditionally, as before stated.)

Cross-int. 1. Do you remember signing the deed?

Ans. Yes.

Cross-int. 2. How many times and in how many places did you sign it?

Ans. Only once, in once place.

Cross-int. 3. Was the deed read one to you?

Ans. No.

Cross-int. 4. What kind of paper was the deed written or printed upon? Describe the paper.

Ans. I think it was a large sheet of paper, as large as a foolscap sheet.

66 Cross-int. 5. Was it all written out or was it partly printed?

Ans. I think it was partly printed and the other part written.

Cross-int. 6. How was the paper folded?

Ans. That is something that I don't recollect.

Cross-int. 7. Do you remember what the color of the ink was in which your name was signed?

Ans. I think it was black ink.

Cross-int. 8. Do you remember who witnessed the signing of your name?

Ans. I don't remember, for I did not know the parties.

Cross-int. 9. How did you know that it was a deed that you were signing?

Ans. I saw that it was a deed. I might have read the one word, deed.

Cross-int. 10. To refresh your recollection, I will ask you to state whether you and your husband, John B. Sims, and Samuel Burson did go to the law office of Andrew L. Osborn, in Laporte, and there talk with him about your age, and whether Mr, Osborn did not write something on the deed that you signed after the talk about your age;
67 and then you and those who accompanied you got up and, leaving the office, took the deed with you?

Ans. I have stated before that I was never in a law office in Laporte, or in any other, to my knowledge.

Cross-int. 11. Have you seen the original of which Exhibit No. 1 purports to be a copy?

Ans. No; I never saw the original that I know of.

Cross-int. 12. You have, then, not examined the signature attached to the original, during this examination, to see whether it was in your handwriting or not?

Ans. I have not.

Cross-int. 13. To refresh your recollection, did you insist, in the presence of said Osborn, about the time or on the day this deed was signed by you, that you were twenty-one years old on the twenty-fifth (25) day of September, A. D. 1846, and authorize him to draw a statement of that kind for you to sign?

Ans. I never saw Mr. Osborn to my knowledge before signing the deed, and I never saw him at all unless he was one of the men that called at my house when the deed was signed. I never told any one that I was twenty-one years old at that time, for it could not be
68 correct. I never authorized any one to draw such statement for me to sign.

ANNA MARIA SIMS.

Subscribed and sworn to before me this eighth day of January, A. D. 1875.

SYLVESTER M. MILLARD,
Notary Public, Cook County, Illinois.

Exhibit No. 1.

The above-mentioned Ann M. Sims, before the delivery of the above deed, and before the payment of the above money or any part thereof, voluntarily, as an inducement to the said Everhart to consummate the bargain, accept the deed, &c., states and declares that she was twenty-one years of age on the 25th day of September, A. D. 1846.

Signed May 28, 1847.

ANN M. SIMS.

In the presence of—
SAMUEL E. WILLIAMS.

(W. B. B.)

S. M. MILLARD,
Notary Public.

69 And the said WILLIAM B. BIDDLE, being duly sworn to testify the truth, the whole truth, and nothing but the truth relating to said cause, deposes as follows:

Examined by A. D. RICH, esq., counsel for complainant:

Int. 1. What is your name, age, occupation, and present place of residence?

Ans. My name is William B. Biddle; my age, forty-four; my occupation, attorney at law; my present place of residence, Laporte, Indiana.

Int. 2. Are you acquainted with the parties to this suit, or any of them? And, if so, state about how long you have been acquainted with them, respectively.

Ans. I am acquainted with the plaintiff. I first met her since the commencement of this suit. I am also acquainted with the de-
70 fendants Everhart and Burson; have known them for about eighteen years. Am not acquainted with the defendant Darlington, personally.

Int. 3. In the cross-examination of Mrs. Sims it has been stated that you or your firm had been consulted in reference to legal proceedings for the recovery of the land in question long before the commencement of the present suit. Please state if you were so consulted, by whom, and what was done, if anything; and if no legal proceedings were then commenced for the recovery of the land, the reason therefor. State fully in regard to such consultation.

Ans. I think it was in the winter of '68 that Mr. Lord, the son-in-law of the complainant, called at the office of Weil and Biddle, in Laporte, Indiana, and stated to us the facts connected with the title to the land in controversy, informed us that it was the desire of Mrs. Sims that he should employ counsel for the purpose of recovering the land upon the ground that she was a minor when the land was conveyed to Magda-
line Everhart, and that she was coerced by her husband to make
71 the deed. In connection with my partner, we examined the record of the title of said land, and other questions connected with the case, with a view to commencing an action for Mrs. Sims, the plaintiff. After such examination we wrote one or more letters, addressed to Mrs. Sims, giving our opinion as to her rights in the matter, but received no answer. The letters were addressed to her at Chicago. After considerable delay John B. Sims, who was the husband of the complainant, called at my office and enquired whether we intended commencing an action to recover the land in controversy. I gave him no definite answer on the subject. But he expressed anxiety that nothing should be done, and continued to urge and insist that we should not do anything in the matter for the reasons stated; but chiefly on the ground that we failed to hear from Mrs. Sims no action was commenced by us at that time.

Int. 4. Will you please state what, if anything, was done by you on behalf of the complainant prior to the commencement of the present suit, in reference to a demand for the possession of the property
72 in question and a formal notice to the defendants, or any of them, of a disaffirmance of the deed of the property by Mrs. Sims. State all the facts. What was done by you in reference to these matters?

Ans. Early in the month of February, 1872, and a few days before the filing of the original complaint in this cause, in the Laport circuit court, having been again employed in behalf of the complainant to assist in the recovery of the land in controversy, as her attorney, I spoke to the defendant, William Eberhart, who was then in the city of La Porte, Indiana, and told him that I was employed as attorney for the complainant, to commence an action for the recovery of the land conveyed

by her and her husband to Magdaline Eberhart, giving a description of it according to the congressional survey. I asked him if he was in possession of that land as one of the executors of Magdaline Eberhart; he said he was as much as any one. I then said to him that the complainant claimed that her deed to Magdaline Eberhart was void for the
reason that she was a minor and a married woman at the time
73 the deed was made, and because the deed was executed by her through the coercion of her husband, and that I, as her attorney, then gave him notice of her disaffermance of said conveyance to Magdaline Eberhart, and for her, the complainant, then demanded the possession of the land described in the bill in this cause. He refused to give possession. He said in substance that he would resist any such claim. He also said that he was the person to see about it. I mentioned in the commencement of the conversation that I learned that he and defendant Mrs. Burson were the executors of the will of Magdaline Eberhart, and for that reason I spoke to him to ascertain who was in possession of the land, and it was in that connection that he told me that he was the proper person to look after anything connected with the land.

Cross-examination by W. H. CALKINS:

Cross-int. 1. State where you were and where said Eberhart was at the time this conversation took place, with reference to the pos-
74 session of the land, and how far you were from the land when this conversation took place.

Ans. On Main street, in the city of La Porte. About four miles from the land.

Cross-int. 2. State the exact language you used, so nearly as you can, respecting the deed given by the complainant and her husband being void.

Ans. I have already attempted to state the conversation as accurately as I could remember. I think I have done so. It was my purpose at the time to become a witness as to what was said in the conversation for the purpose of establishing a formal notice of disaffermance of the conveyance in question, or I should not undertake to state a conversation as definately as I have done. I will repeat it if the counsel desires, as nearly as I can.

Cross-int. 3. Did you at that time know or did Mr. Eberhart that time inform you that Mrs. Darlington was in possession of the land?

Ans. I had no knowledge on the subject, and Mr. Eberhart did not so inform me at that time.

Cross-int. 4. Was this demand made before the commencement
75 of the first action by the complainant in the La Porte circuit court against the defendant?

Ans. It was made after the action commenced by Mr. Flagg, which was dismissed, and before the present action was commenced.

Cross-int. 5. Are you one of the complainant's solicitors in this suit?

Ans. I am.

Cross-int. 6. Have you or your firm a contingent fee, as such solicitors, depending upon the ultimate recovery of the land in this suit; or, in other words, have you a contract with the complainant, by which your fees in whole or in part depends upon the recovery of such lands?

Ans. Our client, as I am informed and have every reason to believe, has but little means with which to pay us for our services, and our compensation will undoubtedly depend largely upon the result of this suit. This I state that the party may have the benefit of it, so far as the ques-

tion of credibility is concerned. I decline to answer as to what contract we may have with our client.

Cross-int. 7. Will you now please state the terms of the con-
76 tract with the complainant with reference to your fees in this suit, or if you decline to testify upon that subject, please make your answer definite as to that point?

Ans. I decline to answer for the reason that it is immaterial what contract we have with our client, and for the further reason that all such matters between us and our client are in writings.

W. B. BIDDLE.

Subscribed and sworn to before me this 8th day of January, A. D. 1875.

SYLVESTER M. MILLARD,
Notary Public, Cook County, Illinois.

Depositions of Diana Wright, Harriet Craig, Zelotas Perrin, Sylvanus Dorlan, and Wm. E. Lay.

The first witness, DIANA WRIGHT, being duly sworn to testify the truth, the whole truth, and nothing but the truth, relating to said cause, deposes as follows:

Examined by J. M. LEMMON, attorney for the plaintiff, and there being present on the part of the defendants their attorney, W. H. Calkins.

Question 1. State your name, age, and place of residence.
77 Ans. Diana Wright; seventy-one years; Green Creek Tp., Sandusky Co., Ohio.

Quest. 2. State whether you were acquainted with the family of Hugh Graham; if so, when and where?

Ans. I was acquainted with the family of Hugh Graham. I got acquainted with them when they moved to the Ridge, about the year 1822.

Quest. 3. State whether you knew his daughter Anna; if you did, when did you first know her.

Ans. I knew her when she was born.

Quest. 4. Who was present when she was born, and when and where was it?

Ans. Mrs. Hannah Graham, Mrs. Lucinda Mead; cannot remember who else; it seems to me Mrs. Pratt was there, but don't remember. It was in the fall of 1828, it was on the farm now occupied by John Perrin, about three and a half miles south of Clyde.

Quest. How are you able to fix the time as being in 1828?

Ans. My girl Mary was born in January, 1828, the 18th, and it was the same year in the fall that Anna was born. And took my baby along—had no one to leave her with. Mr. Graham, Anna's fath-
78 er, carried my baby over to his house.

Ques. 6. What circumstance, if any, makes you remember that Hugh Graham carried your baby over?

Ans. He came after me and I told him he would have to carry my baby if I went and he said he would, and we laughed and talked a good deal about the baby.

Ques. 7. Who got there first?

Ans. Mrs. Hannah Graham was there when I got there. Mrs. Lucinda Mead went with me; Hugh Graham had been to see her first and then came after me, and we went together; Mrs. Mead lived near me.

Ans. In the first place, Mr. Lemmon made a record for us, and he drawed it from that.

Ques. 15. When was Sylvenus married?

Ans. About twenty-two years ago.

Ques. 16. Did he draw the record off before or after he was married? What is your best recollection?

Ans. Before he was married.

Ques. 17. About how long before?

Ans. Must have been two or three years before.

84 Ques. 18. What became of the original writing Mr. Lemmon made?

Ans. It got wore out and lost.

Ques. 19. Was that writing made by Mr. Lemmon at the time or soon after the births of the children?

Ans. Quite a spell after the births of them, but can't tell how long.

Ques. 20. From whom did he get the information to make the writing?

Ans. We had an old Bible with a piece of paper in it on which was written down the births from which Lemmon got it.

Ques. 21. Where is that piece of paper on which it was originally written?

Ans. I can't tell; it is destroyed a long time ago.

Ques. 22. Did Hugh Graham have a family record?

Ans. Can't tell; think likely he had, but don't know.

Ques. 23. What relation was Mrs. Hannah Graham to the plaintiff?

Ans. Hannah Graham is her aunt by marriage.

Ques. 24. Is she still living and where?

Ans. Is living I suppose, but don't know where.

85 Ques. 25. What relation is Mrs. Lucinda Mead to the plaintiff; and if living, where?

Ans. She was called aunt, but no relation; was a sister to Mrs. Hannah Graham. She is dead.

Ques. 26. What relation is Mrs. Pratt to the plaintiff; and if living, where?

Ans. Not any at all, and is dead.

Ques. 27. Where is your daughter Mary, and her name at present?

Ans. She lives in Mercer Co., Ohio, Shane's Crossing, and her name is Mary Smith.

Ques. 28. You may state the name of Lemmon, who made the record, and where he is.

Ans. Forgot his name; went to California long ago.

Ques. 29. Have you known him lately?

Ans. Not for twenty years or more; he was a school-teacher.

Ques. 30. If your mind is impaired by age and your recollection defective, please state how badly.

Ans. My recollection is very bad, caused by age and trouble, and sometimes think I am most crazy.

Re-examination:

86 Ques. 1. You speak of your memory being bad; will you say whether you have any doubt of the truth of your statement that your daughter Mary was born in January, 1828, and that Anna Graham was born in the fall following?

Ans. Have no doubt; I remember it well. I know it is so.

Ques. 2. When these records were written as you have said, where was your husband and how was your memory then?

Ans. He was present at home, and my memory was good then.

her
DIANA + WRIGHT.
mark.

Attest: M. BENNER,
Notary Public.

The second witness, HARRIET CRAIG, duly sworn to testify the truth, the whole truth and nothing but the truth relating to said cause, deposes as follows:

Ques. 1. State your name, age, and residence.

Ans. Harriet Craig; age, 50 years; Green Creek Tp., Sandusky Co., Ohio.

Ques. 2. Were you acquainted with the family of Hugh Graham; if so, when, where, and for how long? How many children had he, if any, and what were their names?

87 Ans. Was acquainted; lived neighbors; first knew them in 1831. My father, Sylvenus Dirlim, moved to Green Creek Township and settled near Mr. Graham's in 1831. Mr. Graham's family moved away in 1832, I think, to the west. When we moved in, Mr. Graham had five children, I think; two girls and three boys; two girls am certain of, and as to number of boys won't be certain. The oldest was Roxa, the youngest girl's name do not remember; was a small girl, might of been two years old or more; of the boys I recollect Alonzo, Luis.

Ques. 3. From what you remember about the youngest girl, how old, at the oldest, might she have been when your people moved into the neighborhood?

Ans. Not over two and a half years.

HARRIET CRAIG.

Ques. 4. If you were at Graham's house, state how often and how intimate you were with the family.

Ans. I suppose I was there two or three times a day, as we got water at Graham's. We lived a quarter of a mile apart; was intimate in the family. I remember this little girl of Graham's. I used to carry her around in my arms; was fond of little children.

88 Ques. 5. What age were you when your people moved into their neighborhood?

Ans. Eight years old the spring before in March.

Ques. 6. What season of the year did you move there?

Ans. In June.

Ques. 7. If you know, who came on to the place where Graham lived when he left?

Ans. Asa Perrin; he came in the summer, and Grahams went away in the fall.

HARRIET CRAIG.

The third witness, ZELOTUS PERRIN, being duly sworn to testify the truth, the whole truth, and nothing but the truth relating to the said clause, deposes as follows:

Ques. 1. State your name, age, and residence.

Ans. Zelotus Perrin; 47 years; Clyde, Ohio.

Ques. 2. Did you know the family of Hugh Graham? If so, when, where, and how long?

Ans. I did in 1832, in Green Creek Tp., Sandusky Co., Ohio; knew

them for about two months; we moved into the house with them, lived in the house with them a week or ten days.

Ques. 3. Did you know Graham's daughter Anna?

89 Ans. Yes; I recollect her distinctly.

Ques. 4. How old was she at the time you moved in?

Ans. I think four or five years.

Ques. 5. Give any circumstances which enable you to remember the year you moved in and the age of this girl Anna.

Ans. I was six years old when we moved on the place, and I was born 1826, so says the family record; have heard it mentioned in the family that it was in 1832 that we moved there and was the year of presidential election of Gen'l Jackson; my father was a Jackson man, and had some encounters with the Whigs.

Ques. 6. What other children had Hugh Graham?

Ans. Roxa and Alonzo, Luis, Arthur, Josiah, I think one, William.

Ques. 7. Where did Graham's family go when they went away from that farm?

Ans. They moved into house about 80 rods from our house called the old Hutchinson house, and staid there I should think about six weeks; they then went west.

Quest. 8. Who moved them away or came after them if you know?

90 Ans. Daniel Graham. I should think he was 16 or 18 years old.

Ques. 9. What was the age of Graham's youngest child when they moved away?

Ans. I should think about one year.

Ques. 10. What month was you born and what month did you move on the Graham place?

Ans. I was born in January, 1826; moved on the Graham place, June, 1832.

Cross-examined:

Ques. 1. How old was Josiah when you first knew them?

Ans. Two or three years, I think. He wore dresses at that time.

Ques. 2. How old was Roxana at that time?

Ans. I think about fifteen years.

Ques. 3. How old was Luis at that time?

Ans. I think about nine years.

Ques. 4. How old was the eldest boy at that time?

Ans. Eleven or twelve, I think.

Ques. 5. Do you know their ages, or do you speak from appearance?

Ans. From appearance.

Ques. 6. Is the same true in relation to the plaintiff?

Ans. Yes.

91 Ques. 7. Do you speak from their ages and appearance from a distinct recollection, or have you refreshed your memory by any conversation or conversations recently had with anybody?

Ans. From recollection. Have had no conversations.

ZELOTUS PERRIN.

The fourth witness, SYLVENUS DIRLAM, being duly sworn to testify the truth, the whole truth, and nothing but the truth relating to the said cause, deposes as follows:

Ques. 1. State your name, age, and residence.

Ans. Sylvenus Dirlim; 87 years old; residence, Clyde, Ohio.

Ques. 2. When did you first move to Green Creek T'p, Sandusky Co., Ohio?

Ans. In 1831.

Ques. 3. Did you ever know the family of Hugh Graham; if so, when and where?

Ans. I knew them in Green Creek T'p, in 1831 and 1832.

Ques. 4. Where did Graham's family then reside?

Ans. They resided in Green Creek T'p.

Ques. 5. How near did you reside to them?

Ans. About 75 or 80 rods distance.

Ques. 6. Do you know Mrs. Harriet Craig?

Ans. She is my daughter.

92 Ques. 7. How many girls had Hugh Graham when you came in; what were their names and ages?

Ans. Two girls; don't remember their names; the oldest about 12 or 13 years old; the youngest about two or three years old; don't know anything about it only from their appearance. The children used to be at my house very frequently, and remember the other children leading this little girl; don't recollect of seeing her carried; she was big enough to walk.

Cross-examined:

Ques. 1. How many boys had Mr. Graham at the time you moved into this county?

Ans. I think he had three.

Ques. 2. How old were they and what were their names?

Ans. Don't recollect their names. Think the oldest might be 12 years old, the others a year or two odds down.

Ques. 3. Is your information derived entirely from their appearance?

Ans. Yes.

Ques. 4. Were there any children younger than the little girl?

Ans. I think not.

SYLVENUS DIRLAM.

The fifth witness, W. E. LAY, being duly sworn to testify the truth, the whole truth, and nothing but the truth relating to the said

93 cause, deposes as follows:

Ques. 1. What is your name, age, and residence?

Ans. William E. Lay; sixty-three years; residence, Green, Creek Township, Sandusky Co., Ohio.

Ques. 2. Did you know Hugh Graham's family; if so, when and where?

Ans. I became acquainted with Hugh Graham in 1825; that was in Seneca Co., Ohio. I became acquainted with his family in 1828, that was in Greek Creek T'p.

Ques. 3. When did you move into this township?

Ans. We moved into this township in December, 1828.

Ques. 4. How near to Hugh Graham's did you settle then?

Ans. On adjoining farm; probably fifty or sixty rods.

Ques. 5. How many girls had Hugh Graham then, and what were their names?

Ans. Had two girls, Roxana and Anna.

Ques. 6. How old was Anna then?

Ans. She was a small child, an infant; probably from three to six months old.

Cross-examined:

Ques. 1. Were there any children younger than Anna?

94 Ans. Not at that time.

Ques. 2. Were there subsequently, and give their names.

Ans. My impression is there was one, but not positive about the name.

Ques. 3. Was there any other children? If so, give their names and ages.

Ans. There was other children. The oldest boy, Alonzo, about seven or eight years at that time; Luis, about five or six years; Arthur, some three or four years old, unless there was one younger than Anna, I think, but am not positive about name.

Ques. 4. When and where was the youngest one born?

Ans. Green Creek T'p, Sandusky Co., Ohio; sometime during the summer or fall of 1828.

Ques. 5. What time in the year 1828 did you move on the farm adjoining Mr. Graham?

Ans. It was in the month of December; we were to work there during the summer, fixing the house to move into. I attended a piece of corn on some land Mr. Graham had charge of adjoining his farm on the south.

Re-examined:

95 Ques. 1. In cross-question 4, you were asked when and where the younger one was born, and you answer during summer or fall of 1828. Please explain which child you mean to say was born in summer or fall of 1828?

Ans. I mean this girl Anna.

Ques. 2. Please mention any circumstance or event that enables you to say that it was in 1828 that you moved on the place near Graham's?

Ans. I recollect it from the fact that it was in December after Gen'l Jackson had been elected President the first time, and I also have an old account book in my possession my father kept at that time. In that I find accounts charged to individuals where we moved from in Seneca Co. up to about that time; right after that I find accounts charged to individuals living in the neighborhood where we moved to in Green Creek T'p; my father was a shoemaker.

Recross-examined:

Ques. 1. When and where was the youngest child born, if you know?

Ans. It was on the place adjoining the place where I lived.

96 Ques. 2. What year did Hugh Graham move west?

Ans. In 1832, I believe.

Ques. 3. Did you know anything of the family after that?

Ans. I did not, only from hearsay.

Ques. 4. In the year 1828, when you first became acquainted with them, what circumstance is there that makes you recollect that the then youngest child was a girl?

Ans. The then youngest child was not a girl, but between the first time I seen them in 1828 and next fall this girl was born.

Ques. 5. What circumstance makes you recollect that that child was a girl?

Ans. They called it a girl, and it looked like a girl, and they called its name Anna.

W. E. LAY.

Depositions of Hannah Graham Fogden and Daniel M. Graham.

The said HANNAH GRAHAM FOGDEN, being duly sworn to testify the truth, the whole truth, and nothing but the truth relating to said cause, deposes as follows:

Examined by Mr. RICH, one of the plaintiff's attorneys:

97 Ques. 1. What is your name, age, and occupation, and where do you reside?

Ans. Hannah Graham Fogden; I am 75 years old the last of this month; nothing particular now, but years ago all kinds of work; I reside in Jefferson, Cook Co., Illinois.

Ques. 2. Are you acquainted with Mrs. Anna Maria Sims, the plaintiff in this suit?

Ans. I am.

Ques. 3. How long have you been acquainted with her, and where did you reside when you first became acquainted with her?

Ans. I have known her about forty-three (43) years. I lived in Sandusky, Butternut Ridge, Ohio.

Ques. 4. Were you present when Mrs. Sims was born; and, if so, state about how near you resided to the family in which she was born, and what year was it?

Ans. I was. I lived about a half a mile from the family in which she was born. It was in the year 1828.

Ques. 5. State, if you remember, the month of the year in which she was born, and the day of the month.

Ans. It was in September 25th, 1828.

98 Ques. 6. State what relationship, if any, you bear to Mrs. Sims.

Ans. Her father and my husband were brothers.

Ques. 7. Have you had more than one husband? And, if so, state which husband was brother of her father.

Ans. I have. Lemuel Graham, my first husband, was the brother of her father.

Ques. 8. State how long you resided at the place you have mentioned in Ohio after the birth of Mrs. Sims, the plaintiff.

Ans. I lived there from September 25th, 1828, to October 1st, 1830.

Ques. 9. State where you have resided since that time, as nearly as you can recollect.

Ans. I have resided in Michigan, in St. Joseph County, twenty-five years ago. I removed from St. Joseph County to Gilead, in Branch County, Michigan. I resided there until August 13, 1871, when I came to Jefferson, where I now reside.

Ques. 10. Please state any events or circumstances connected with yourself or your own family which enables you to fix the date of Mrs. Sims' birth, if you recollect.

Ans. I can go back from the beginning. When Mrs. Sims'
99 mother and I were first married, we lived together—that is, our two families—a good part of the time. During that time we each had five children. When Mrs. Sims was born, which was in 1828, I was there with her, and as she was a girl, and the fifth, and as I knew all the births of her mother Susan's children before and at that time, and as she was a girl, we were all pleased with it, and I set it down in my mind. In two years—that is, in August, 1830—I had a son, and he was two months old lacking a day when we started for Michigan. This makes me remember more particularly that Mrs. Sims was two years old on

the 25th day of September, 1830. This son I mean was Andrew Jackson Graham.

Ques. 11. Where does this son Andrew Jackson Graham now reside?

Ans. In New York City.

Cross-examination by Mr. BRADLEY, one of attorneys for defendants:

Ques. 1. What was the name of Mrs. Sims' father?

Ans. Hugh Graham.

Ques. 2. Where did he live in 1840, and thence afterwards?

100 Ans. As I remember, in 1840 he lived in Sandusky, Ohio. If I have not thought aright, I can't think anything about it. No; I now think upon reflection that in 1840 he lived in Laporte County, not in Sandusky, as I before stated.

Ques. 4. Did Hugh Graham have a daughter other than Mrs. Sims?

Ans. He did. Her name was Roxana. She has been dead a good many years.

Ques. 5. Where did she die?

Ans. I think in Laporte, Indiana.

Ques. 6. Can you tell from your recollection where she was born?

Ans. I can't exactly, but she was a little younger than Daniel Graham, my son.

Ques. 7. Can you state where Daniel Graham was born?

Ans. I said I could not; but I can just tell how old he is. He will be 55 the 17th day of November, 1872.

Ques. 8. Will you state how many children Hugh Graham had older than Anna Maria, the plaintiff, and give their names and the date of their birth?

Ans. I cannot do it. I can give their names. The oldest was Roxianna, the next was Alonzo, the next Elias, the next Arter or Arthur; that's all. She was the fifth.

101 Ques. 9. Can you say when Hugh Graham settled in Laporte County, Indiana, and how long he lived there?

Ans. I can't tell exactly; I could by a little reckoning.

Ques. 10. Do you know that he ever lived in Laporte County, Indiana?

Ans. I know that they called it Laporte. I was there twice visiting.

Ques. 11. State when you was there did you see Anna Maria, the plaintiff? When was it, and how old was she at that time?

Ans. Yes; I saw her. I can't tell exactly when it was, and I can't tell exactly how old she was.

Ques. 12. When was it when you were there the last time, and give your opinion how old she was at that time?

Ans. I can't tell in what year or anything about it. She might have been six years old. I can go back and calculate her age.

Redirect examination by Mr. RICH, one of plaintiff's attorneys:

Ques. 1. Please state with whom are residing at Jefferson, Illinois.

Ans. I reside with my son, Arthur Graham.

Ques. 2. What has been the state of your health for the past few years?

102 Ans. It has been as good as could have been expected for a person of my age.

Ques. 3. In reference to the time when you left Ohio, I would like to have you state that time again.

Ans. I stated on the 1st day of October, 1830.

Ques. 4. When you left did Hugh Graham still reside there?

Ans. According to my best recollection he did, and was still there?

Ques. 5. Have you ever returned to Ohio since you removed at that time?

Ans. Yes; I have been there twice.

Ques. 6. In reference to Hugh Graham residing in Ohio, what did you mean to say in reference to the year in which you left him there?

Ans. I meant to say in the year 1830.

HANNAH GRAHAM FOGDEN.

And the said DANIEL M. GRAHAM, the second witness, being duly affirmed to testify the truth, the whole truth, and nothing but the truth relating to said cause, deposes as follows:

Examined by Mr. RICH, one of the plaintiff's attorneys:

Ques. 1. What is your name, age, and occupation, and place of residence?

103 Ans. Daniel M. Graham. I was born November 17th, 1817. I am a clergyman and president of Hillsdale College. I reside at Hillsdale, Michigan.

Ques. 2. Are you acquainted with the parties to this suit, or either of them; and, if so, how long have you been acquainted with them?

Ans. I am acquainted with Mrs. Sims. I don't know that I know any of the defendants. I have known Mrs. Sims from the time of her birth.

Ques. 3. What relation are you to Mrs. Sims?

Ans. I am her cousin.

Ques. 4. Where did you reside at the time of her birth, and how near to her family?

Ans. I lived in Green Creek, Sandusky County, Ohio. The particular neighborhood was called Butternut Ridge, about four miles south of Clyde. I lived ½ a mile to a mile from her house.

Ques. 5. State, if you know, what is the date of the birth of Mrs. Anna Maria Sims, the plaintiff, and in this connection state any facts or circumstances which fix the date of her birth.

104 Ans. I am not able to fix the day, month, or year of her birth only as the following circumstances indicate. In the family she was always called eleven years younger than myself, and she was the baby in the family when we moved from Ohio to Sturgis, Michigan, October 1st, 1830.

Ques. 6. Do you recollect the event of her birth?

Ans. Yes; I have a very distinct recollection of it, as I had to stay with the children while my mother was away assisting at their house. She carried the baby, Harriet, with her, and I had to take care of the rest of the children.

Ques. 7. State, if you can, how old the baby, Harriet, was at that time?

Ans. I cannot state exactly without referring to family records. If I recollect she was about twenty months old; as nearly as I can recollect Harriet was born on February 25th, 1827.

Ques. 8. State, if you know, where Mrs. Sims, the plaintiff, has resided since 1847.

Ans. I only know that since December, 1866, she has resided in Chicago, Illinois.

Ques. 9. State where she resides in Chicago at the present time, her business, and circumstances.

105 Ans. She lives at No. 83 West Van Buren street, and gets her living by sewing, which indicates her circumstances.

Ques. 10. Do you now recollect any other circumstances connected with the birth of Mrs. Sims, the plaintiff? If so, state them.

Ans. I recollect that my uncle, her father, Hugh Graham, was blind at the time of her birth, and it was spoken of in the family that he did not see his daughter until she was three months old.

Ques. 11. What is the age of your brother, Andrew Jackson Graham?

Ans. He was born in August, 1830.

DANIEL M. GRAHAM.

Depositions of Josiah W. Graham and R. R. Stevens, examined by A. D. Rich for the plaintiff.

The said JOSIAH W. GRAHAM, being duly sworn to testify the truth, the whole truth, and nothing but the truth relating to said cause, deposes as follows:

Ques. 1. Please state your name, age, residence, and occupation.

Ans. Josiah W. Graham; 42 years of age, October 12th next; residence, Hamilton, Illinois; occupation, carpenter and joiner.

Ques. 2. Are you acquainted with the parties to this suit, Anna Maria Sims being plaintiff, and William Everhart and Elizabeth E.
106 Burson, executors, &c.? And, if so, state how long you have been acquainted with them, or any of them.

Ans. I am acquainted with none of the parties but Anna Maria Sims; have known her since I was big enough to know any person.

Ques. 3. State what family relation she is to you, if any.

Ans. She is my sister.

Ques. 4. State how much of your life you have spent in Mrs. Sims' family, or with her in your family.

Ans. All my life except 14 or 15 years.

Ques. 5. Where was you born?

Ans. In State of Ohio, Sandusky County.

Ques. 6. Where did you reside next?

Ans. In Michigan for a short time, and my father moved to La Porte Co., Indiana.

Ques. 7. About how long did you live in La Porte Co.?

Ans. 15 or 16 years.

Ques. 8. Where did you remove to from there?

Ans. Milwaukee, Wis., for a short time.

Ques. 9. And where from Milwaukee?

Ans. I went back to La Porte and staid one year.

Ques. 10. Where then?

Ans. To Chicago, Illinois.

107 Ques. 11. Please state whether or not your sister, Mrs. Sims, the plaintiff, resided with you or in the same family during your residence in La Porte, and whether she removed with you from La Porte and resided with you or in the same family with you in Milwaukee and Chicago?

Ans. We resided together in La Porte, and we moved together to Milwaukee, and we have lived together most of the time in Chicago.

Ques. 12. State about when you removed from Chicago to your present place of residence.

Ans. I left Chicago in 1858. I went to Fort Madison. She had moved there a short time before, and there I lived with her.

Ques. 13. Just go on, Mr. Graham, and give a brief history of your place of residence and hers since you removed to Fort Madison.

Ans. She lived about two years in Fort Madison and then she came back to Chicago; the most of the time I was with her there, it was 3 or 4 years. I did not see her till I came back to Chicago, then I was with her for the next 3 years. I left Chicago, and was gone 7 years until I returned this last summer. I have been with her since then. My family still reside in Hamilton.

108 Ques. 14. Do you know Mrs. Sims' age; and, if so, state it; and in connection therewith state any particular facts or circumstances which may occur to you on which your knowledge is based.

Ans. I do know her age. She is 45 years of age the 25th day of September, 1873. I know that to be her age, because I have seen it on the records and have copied these records from my own father's handwriting.

Ques. 15. Please state what has become of the family records of which you have spoken in your last answer?

Ans. They were lost in the city of Milwaukee; were packed in a trunk and were lost at the hotel.

Ques. 16. Did you have these family records up to the time of your removal from La Porte?

Ans. Yes, sir.

Ques. 17. Had you seen them often prior to that time?

Ans. I had often seen them and copied them.

Ques. 18. Please describe the record. What shape was it in; what kind of a book?

Ans. The record was in the shape of a picture, hanging on the wall.

Ques. 19. Was it in any other form?

109 Ans. The record was also in a family bible. I had reference in my last answer more particularly to the framed record hanging on the wall; it was an every day matter.

Ques. 20. How does Mrs. Sims' age compare with your own?

Ans. She is three years older than me.

Ques. 21. Had you any brother or sister between yourself and Mrs. Sims? If so, give the name.

Ans. No, sir; there were none.

Ques. 22. State whether or not you were present when your sister, Mrs. Sims, the plaintiff, was married; and, if so, when and where the marriage occurred.

Ans. I was present; she was married July 4th, 1844, at La Porte, Indiana, on the old homestead farm, four miles from the city of La Porte, in the county of La Porte.

Ques. 23. State whether or not your mother was living at that time; and if not, state when she died.

Ans. She was not living at that time; she died on the 13th day of August, 1843.

Ques. 24. Was your father present at the marriage?

Ans. Yes, sir; he was.

110 Ques. 25. How long after that time did he continue to reside in La Porte? State when he left and where he went, if you know.

Ans. He resided in La Porte a year and a half after the marriage, then he went to Oregon, and then to California. He died in California. He never returned to La Porte; died shortly after he went to California.

Cross-examination by W. H. CALKINS, attorney for defendants:

Ques. 1. What year did you leave Ohio?

Ans. I was too young to recollect.

Ques. 2. Do you recollect the time of your arrival in Michigan?

Ans. I do not; I was too young then; I cannot even recollect the time of my arrival at the State of Indiana.

Ques. 3. Had you any other sisters except the plaintiff?

Ans. Yes, sir; I had three other sisters—two younger and one older.

Ques. 4. How many children were there of you in the family?

Ans. I think there were eleven.

Ques. 5. What year was the oldest one born, and what was its name?

Ans. Oldest was born in 1820; I cannot exactly remember
111 which was the oldest; I think Alonzo Graham was the oldest; in fact I know he was when I think of it.

Ques. 6. State the month and day of month when he was born.

Ans. I don't think I can do it as regards the month and day of the month; I can recollect the year; I had the records.

Ques. 7. State the name of the next oldest; the day, the year and month he or she was born.

Ans. Roxy Ann Graham; I don't think I can give the day and month, the year is 1822; I have forgotten the date of the month.

Ques. 8. Now the next oldest in like manner.

Ans. Julius W. Graham, born 22nd December, 1824.

Ques. 9. Next.

Ans. Arter Graham, born 7th October, 1826.

Ques. 10. Next.

Ans. Anna Maria Sims, then Anna Maria Graham, born 25th September, 1828.

Ques. 11. Next.

Ans. Josiah W. Graham, myself, born 12th October, 1831.

Ques. 12. Next.

Ans. William Graham, born 16th October, 1833.

Ques. 13. Next.

Ans. Susan Alvira Graham; I think the date she was born
112 has slipped my memory, but I think it is the 7th May, 1835.

Ques. 14. Next.

Ans. James Henry Graham. I dont think I can give date of birth; the dead have all slipped my memory, but I have the records of all of them; he died when he was a very small boy.

Ques. 15. Go on without further interrogation. State the names and ages of the rest of them.

Ans. Julia Ann Graham, she is the baby; I can't give the dates of when she was born—slipped my memory.

Ques. 16. How old was you when you left La Porte and went to Milwaukee?

Ans. I was 17 years old.

Ques. 17. How old were you when you came to Chicago first?

Ans. I was 20.

Ques. 18. How old was your father when he died?

Ans. I cannot tell.

Ques. 19. How old was your mother when she died?

Ans. I could not tell; has slipped my memory; could tell by looking at the records.

Ques. 20. What record do you refer to when you say you could tell by looking at the records?

113 Ans. I refer to the record I took from the original.

Ques. 22. You say the original record was lost or destroyed in Milwaukee. Now state in whose handwriting the original record was made.

Ans. It was in my father's handwriting.

Ques. 23. Did you ever see your father write?

Ans. Yes, sir, frequently; and have his handwriting at home.

Ques. 24. You say the record was kept in a Bible; do you know whether the record in a frame which you refer to was copied from the Bible record?

Ans. I could not say.

Ques. 25. State whether your folks owned the Bible before you ever saw the record in the frame.

Ans. Yes, sir; they owned it.

Ques. 26. Will you now state whether you have a copy of this frame record in your possession, and, if so, where it is.

Ans. I had a copy till three years ago, and I may have it at present. I can find it when I go home.

Ques. 27. Is your knowledge of the plaintiff's age derived solely from the record which you refer to?

114 Ans. No, sir; 'tis not derived from the record, 'tis derived from the knowledge of my own age, knowing she is three years older than I.

Ques. 28. Why is it you are not able to state the ages of your other brothers and sisters as definitely as you do the plaintiff's?

Ans. Because we have been together all of our lifetime, more or less.

Ques. 29. Have you been separated from your other brothers and sisters, and have you had no communication with them since if you were grown up?

Ans. I have been separated from my other brothers and sisters, and have had no communication except by letters—except by one, Julia Ann.

Ques. 30. What time did your father leave La Porte, Indiana, for Oregon?

Ans. He left in the spring of 1846.

Ques. 31. How long had your mother been dead at that time?

Ans. 3 years. She died in 1843.

Ques. 32. In what year did your father die?

Ans. I can't state exactly; 1848 or 1849; I can't be positive.

Ques. 33. What information did you get of his death; how did you get it? and state particulars.

115 Ans. We got it through letters from my brother; he was out hunting and shot himself by accident, and died quite suddenly.

Ques. 34. State where your mother died.

Ans. She died in the old homestead farmhouse in La Porte County, Indiana.

Ques. 35. You say the plaintiff was married at the old homestead in La Porte County, Indiana. Were you present at said marriage?

Ans. Yes, sir.

Ques. 36. How old was the plaintiff at that time?

Ans. She would have been 16 years old the 25th of September following; she was married on the 4th of July.

Ques. 37. If the plaintiff is unmarried now, how long has she been single?

Ans. She has been unmarried and has been single 5 or 6 years; that is, she has not lived with her husband 5 or 6 years.

Ques. 38. Now state if you have any recollection of the date or about the date that the plaintiff conveyed the land in controversy in this action; if so, state about when it was.

Ans. I think it was in June, 1848, if I am not mistaken.

116 Ques. 39. State where the plaintiff has resided since that time.

Ans. She has resided in La Porte and Milwaukee, Chicago, Fort Madison.

Ques. 40. State the length of time she resided in each of these places.

Ans. I can't give the time exactly; about a year in La Porte, after the deed was executed, and 2 years in Milwaukee, or near that; 2 years in Fort Madison, and the rest of the time in Chicago, Illinois.

Ques. 41. How far is La Porte distant from Chicago?

Ans. Near as I can recollect it is about 56 miles.

Ques. 42. You may state whether you had any conversation with the plaintiff since the commencement of this action about her age.

Ans. No, sir; I have not. If I had I could have told the ages of all my brothers and sisters.

Ques. 43. Have you had any conversation concerning the suit?

Ans. None of any consequence. She merely told me she was going to have a suit and try to recover the land.

Ques. 44. Have you talked with her about what your testimony would be?

117 Ans. No, sir; never did. I did not know my testimony would be necessary until within a day or two.

Ques. 45. Are you making it your home with your sister now?

Ans. I am boarding with my sister at the present time.

Q. 46. You may state the names of your father and mother.

Ans. Hugh Graham was my father's name; Susanna was my mother's name.

Ques. 47. Are you not mistaken as to the place where your sister was married; was she not married at the house of Martin Shuiltz in La Porte County, Indiana?

Ans. I think not.

Redirect:

Ques. 1. You are now at work at your trade in the city, are you not?

Ans. Yes, sir.

Ques. 2. You have stated that you took a copy of the family record made by your father; have you made any search for your copy?

Ans. I have not definitely; but I will do so when I return home; it is in my father's account-book which he gave to me.

Ques. 3. Have you seen that book recently or have you missed it from your papers?

118 Ans. I have missed it for about 3 years; I have not looked for it, as I had no use for it.

Ques. 4. I understood you to state that you thought there were 11 children in your father's family; you have given the names of only nine; how about the others, had they any names?

Ans. I might be mistaken as to the number; the last one died without a name, at the time of my mother's death. I now think there were only ten in all.

Ques. 5. State as near as you can at about what time you made the copy of the family record of which you have spoken.

Ans. I think it was about 24 years ago, as near as I can recollect; it was prior to my leaving Laporte Co., Indiana.

Ques. 6. Have you any sort of doubt as regards your sister's, the plaintiff's age?

Ans. No, sir; not in the least.

Ques. 7. Has anything she has said to you about the case or about

your testimony had any influence whatever upon your mind or recollection as to her age?

Ans. No, sir; we have never spoken a dozen words in regard to the case.

Ques. 8. How many other boarders has Mrs. Sims besides yourself?

119 Ans. She has three boarders besides myself; two of them are her sons, who pay board.

Ques. 9. Do you desire to make any correction in your testimony as to the time Mrs. Sims executed a deed of the Laporte County farm, in controversy? If so, please make it.

Ans. I wish to state I made a mistake of one year in the time of the deed; it should be 1847; 1848 was the year we moved to Milwaukee, and the deed was made the year before.

J. W. GRAHAM.

And the said R. R. STEVENS, being duly sworn to testify the truth, the whole truth, and nothing but the truth, relating to said cause, deposes as follows:

Ques. 1. What is your name, age, residence, and occupation?

Ans. R. R. Stevens; 43 years; Chicago; my occupation is compiling of judgement records in State and Federal courts for the purpose of making abstracts of title to real estate in county of Cook.

Ques. 2. What business were you in, in 1869, 1870?

Ans. I was engaged in same business.

Ques. 3. Please state whether you know of your own knowledge that the records of the superior court of Cook County have been destroyed; and, if so, when and how?

120 Ans. They were destroyed on 8th and 9th of October, 1871, by fire.

Ques. 4. Will you state what you know, if anything, about a divorce case in the superior court, wherein Anna Maria Sims was plaintiff and John B. Sims the defendant? State if you know when the bill was filed, when the decree of divorce was entered, and your means of information.

Ans. A bill for divorce was filed December 15, 1869, by Anna Maria Sims against John Barton Sims, charging adultry; a decree for divorce was entered February 14, 1870; question of alimony was reserved. I examined the bill on the day it was filed, also the decree after it was spread upon the records of the court, and made entries of the same in the abstract books of Chase Bros. and Co., makers of abstracts, conveyances, &c., which books are now in possession of said firm in the city of Chicago.

Ques. 5. You derive the information you have above given from the original papers, the bill and decree?

Ans. I did.

Ques. 6. State whether in your opinion the original files and records which you have referred to are entirely destroyed.

121 Ans. They are.

R. R. STEVENS.

Depositions of Louisa M. Lord, Mary A. Graham, and James H. Shannon.

The said LOUISA M. LORD, being duly sworn to testify the truth, the whole truth, and nothing but the truth relating to said cause, deposes as follows:

Examined by ARTHUR D. RICH:

Interrogatory 1. Please state your name, age, residence, and occupation.

Answer. Name is Louisa M. Lord; age, 28 on the 12th of November, '73; residence, 231 South Sangamon street, Chicago, Illinois; occupation, am an artiste.

Int. 2. Are you a relative of the plaintiff in this suit, Anna Maria Sims? And if so, state what relation?

Ans. I am her oldest daughter.

Int. 3. Please state how long you resided at home with your mother.

Ans. Nineteen years. Was married to James A. Lord when I was nineteen, and have since lived with him.

Int. 4. Please state if you know what has always been the reputed age of your mother, Anna Maria Sims, in your family.

Ans. We have always been accustomed to celebrate her birth-
122 day on the 25th of September, and that she was born in 1828; she is now 45 years old on the 25th of last September; have continued to celebrate her birthday since my marriage by sending her presents and in other ways.

Int. 5. Are there any other circumstances which fix her age upon your mind?

Ans. I have often seen the family record.

Int. 6. Please describe the record.

Ans. It was in a frame, it hung upon the wall; the frame was red wood, cherry I think; there was also a record of the deaths. I have an indistinct recollection of a Bible, very old, and of seeing the writing therein, but my strongest recollection is of the picture.

Int. 7. Have you ever heard others, the friends or relatives of your mother, speak of her age? And if so, mention the names of some of the persons who have spoken of it, and in that connection state what age they gave her.

Ans. I have heard my uncle Josiah speak of her age and state that she was three years older than himself, and also heard my grandfather and grandmother, John and Clarissa Sims, speak of her age, also my aunt Julia Watson and my father; they have stated that there
123 was about 17 years difference in my age and my mother they have frequently spoken of her being born in 1828; my aunt Julia, my mother's youngest sister, was brought up with me and knows all about mother's age.

Int. 8. Was it your invariable custom to observe or celebrate in some way your mother's age in your family?

Ans. Yes; always ever since I can remember. Last year, on the 25th of September, I sent her presents.

The defendants appear and cross-examine conditionally, reserving all questions as to the *the* sufficiency of the notice and the time of taking the deposition.

Cross-examined by W. H. CALKINS:

Cross-int. 1. You may state where you reside.

Ans. 231 Sangamon st., Chicago.

Cross-int. 2. Are you married, and if so, state the name of your husband and his occupation, how long you have been married, and where you have resided since your marriage.

Ans. Husband's name is James A. Lord; he is an artiste; have been married nine years; have resided in Chicago, Illinois, since my mar-

Cross-int. 3. Where and with whom did you reside at the time of your marriage?

124 Ans. Resided with my mother in Chicago.

Cross-int. 4. Where was your father at the time of your marriage?

Ans. He was in the army.

Cross-int. 5. Please state whether there was a separation between him and your mother; if so, when they ceased to live together?

Ans. There was a separation between father and mother; as near as I can tell it, I think it is six years or longer, about eight years since the final separation.

Cross-int. 6. In whose handwriting was the family record which you described as a picture hanging on the wall?

Ans. I think it must have been my grandfather's. I have seen letters from my grandfather—my mother's father.

Cross-int. 7. Is that the only knowledge you have of its being in your grandfather's handwriting?

Ans. That is the only knowledge I have. The letters and the record appeared in similar handwriting.

Cross-int. 8. Please state in what year your grandfather died.

Ans. I can't say positively as to the date, but I think I was be-

125 tween 8 and 9 years of age. I remember the circumstances very well.

Cross-int. 9. Please state what letters you have seen from your grandfather and when they were written?

Ans. I have seen a number, but one in particular—of course I can't tell the date, but it was just a short time before we received news of his death.

Cross-int. 10. Did you ever see your grandfather write?

Ans. No; not hardly, scarcely old enough.

Cross-int. 11. Then your knowledge of his handwriting depends entirely upon what others told you, does it not?

Ans. Yes, sir; what my mother and father said.

Cross-int. 12. You speak of a Bible which contained a family record of which you have an indistinct recollection; will you now please state whether said record which you call a picture was not copied from said record contained in said Bible?

Ans. I could not say as to that.

Cross-int. 13. Did you ever hear your mother say whether it was or was not?

Ans. I think not, not that I can remember.

126 Cross-int. 14. Was there ever but one family record of births contained in a frame which you described as a picture, that you know of?

Ans. There was only one of births that I can remember.

Cross-int. 15. In whose possession was that when you first saw it?

Ans. In my mother's possession.

Cross-int. 16. What became of it, if you know?

Ans. Must have been destroyed or lost in some way.

Cross-int. 17. Have you recently made any search for it; if so, what?

Ans. No, sir, I have not; because it was not in my possession.

Cross-int. 18. What became of the Bible containing said family record, if you know?

Ans. I do not know.

Cross-int. 19. What inquiry or search have you recently made, if any, for said Bible?

Ans. I have made no search for it, nor any inquiry.

Cross-int. 20. Please state what relatives of your mother you have heard speak of her age?

Ans. My uncle Josiah Graham, my aunt Mrs. Julia Watson; I think that is all of my mother's people.

Cross-int. 21. Where do your uncle and aunt live at the present time?

127 Ans. My uncle lives in Chicago, Illinois, and my aunt in Fort Madison, Iowa.

Cross-int. 22. How often have you seen your aunt, and about how often have you heard her speak of your mother's age?

Ans. She always lived in the family until she was married, quite often; it has been some time since I have seen her; about two years.

Cross-int. 23. Has the ages of your uncles and aunts been discussed in your family? And if so, state their age so far as you know.

Ans. I have heard my uncle Josiah state what his age was; I don't think I can say positively my aunts' age; don't know the ages of any others.

Cross-int. 24. Have you talked with your mother concerning her age, since the commencement of this suit?

Ans. No, sir, I have not.

Redirect:

Int. 1. I have understood you to say that you have resided with your husband and not with your mother since your marriage. Am I correct?

Ans. Yes, sir.

Int. 2. Do you know when the decree of divorce was granted between your mother and father—the exact time?

128 Ans. I have heard them speak of the time, but don't know exactly.

Int. 3. You have spoken about a separation between your mother and father; do you mean to be understood as stating anything from your own knowledge in regard to this?

Ans. I was not at home at the time, consequently can only answer from knowing that they do live together.

Int. 4. In using the word "separation" or "final separation," do you allude to the decree of divorce which was granted? Please explain further your meaning by the use of these terms.

Ans. I simply mean by separation, that they were not living together, as I understood; and I do not allude by using these terms to the decree of divorce which was granted. I could not state positively or from my own knowledge that they did not live together, for I was away a great deal of the time. Up to the time of the decree of divorce he visited at the house where my mother lived, and some of the time boarded in the same house.

Recross-int. 1. Did they ever live together as husband and wife, since the separation you spoke of 6 or 8 years ago?

Ans. I don't really know.

LOUISA M. LORD.

129 And the said MARY A. GRAHAM, being duly sworn to testify the truth, the whole truth, and nothing but the truth relating to said cause, deposes as follows:

Examined by ARTHUR D. RICH:

Int. 1. Please state your name, age, residence, and occupation.

Ans. My name is Mary A. Graham; age—was born March 7, 1848; residence No. 155 Meridian st., Chicago, Illinois; my occupation is that of an actress.

Int. 2. State how you are related to the plaintiff in this suit, Mrs. Anna Maria Sims.

Ans. I am her second daughter.

Int. 3. Please state how long you have resided at home with your mother?

Ans. Have always lived at home.

Int. 4. Please state whether you are married, if so, when; what is your husband's name, and where you have resided since your marriage?

Ans. I am married; was married December 1st, 1871, to Lemuel L. Graham; have continued to reside, since my marriage, with my mother in Chicago, except occasional trips I have taken into the country.

Int. 5. Do you know your mother's age, and if so, please state what it is, and your means of information.

130 Ans. I think I know her age; we have always celebrated her birthday on the 25th of September, by giving her presents. Her birthday is the 25th September, 1828; I have always so understood it from all my family relations; have often heard them speak of her age.

Cross-examination by W. H. CALKINS:

Cross-int. 1. You may state if your father and mother are now living together as husband and wife; if not, when the final separation took place.

Ans. No; they are not living together as husband and wife. The final separation took place in February 14th, 1870.

Cross-int. 2. Did your father and mother live together as husband and wife up to the 14th day of February, 1870, and if not, how long prior to that time had they ceased to live together as such?

Ans. No, sir, they did not live together up to that time as husband and wife; I think it was 8 or 10 years from now since they ceased to live together; I know of his coming home frequently during that time; I cannot say whether they lived together as man and wife at such times.

Cross-int. 3. I desire you to state your best knowledge and infor-

131 mation as to whether your father and mother lived and cohabited together as husband and wife up to the time the divorce was granted; if not, state as near as you can when they ceased to live together as husband and wife. If you have any knowledge on the subject, I desire you to state it.

Ans. I don't know anything about it; all I know is, that when he came to the house he staid there; he boarded in the same house with us a week at a time, sometimes two weeks.

Cross-int. 4. Do you or do you not know whether they occupied the same sleeping apartments at the times you state he staid at your house; if so, please state.

Ans. I do not know.

MRS. MARY A. GRAHAM.

And the said JAMES H. SHANNON, being duly sworn to testify the truth, the whole truth, and nothing but the truth relating to said cause, deposes as follows:

Examined by ARTHUR D. RICH:

Int. 1. What is your name, age, occupation and residence?

Ans. My name is James H. Shannon; age 38; occupation real estate and loan broker; live in Hyde Park, Cook County, Illinois.

Int. 2. What business were you in 1870?

Ans. I was clerk of the circuit court of La Porte County,
132 Indiana, and ex-officio clerk of the court of common pleas, La Porte County, Indiana.

Int. 3. Please state what arrangement you had in your office in reference to the delivery of writs or summons issued by you or by the courts named to the sheriff of the county.

Ans. For the first 6 or 7 years I held the office I delivered them in a drawer called the sheriff's drawer, in the office; some two years ago, don't remember the exact time, the sheriff procured a tin box which he placed in the office in vacation, into which we put all writs issued during vacation. In term time this box was taken from the office and placed in the court-room, into which we placed all writs issued in the court-room; the writs issued in the clerk's office during term time were placed in the sheriff's drawer which he still retained in the clerk's office.

Int. 4. Was it your invariable custom to deliver writs to the sheriff of La Porte County in the way you have above described?

Ans. It was almost the universal custom; there were some ex-
133 ceptions; sometimes the sheriff was present and writs were handed to him by me or my deputies, sometimes the writs were handed to attorneys. With the exceptions named it was the custom to deliver them in the sheriff's box or drawer.

Int. 5. How often or about how often did the sheriff call for the papers deposited in this box or drawer as above stated?

Ans. He called very frequently; I might say, almost daily.

Int. 6. Do you remember the circumstance of the issuing and delivery of the writ in this particular case?

Ans. I do not.

Cross-examination by W. H. CALKINS:

Cross-int. 1. State where said drawer was located in the office with reference to the long desk.

Ans. I can't state positively where it was at that time; the sheriff changed his drawer 2 or 3 times during my time of office; the last delivery drawer which he used and the one which I think he used for the last two years from this time, was located in the lower tier of drawers over the desk; the second one from the right or next to the clerk's cash drawer.

JAMES H. SHANNON.

134 Deposition of James M. Flagg.

The said JAMES M. FLAGG, being duly sworn to testify the truth, the whole truth and nothing but the truth relating to said cause, deposes as follows:

Examined by A. D. RICH, esq., who appears for the plaintiff in said cause.

Int. 1. What is your name, age, place of residence and present occupation?

Ans. My name is James M. Flagg; age 56; residence, Chicago, Illinois; am a lawyer.

Int. 2. Do you know the parties, plaintiff and defendants in this suit, or any of them, and which of them, and how long have you been acquainted with them, respectively?

Ans. I know the plaintiff; have known her about four years. I don't know the defendants or either of them.

Int. 3. Did you ever have any business relations with the plaintiff, and, if so, state generally what they were.

Ans. I have had business relations with the plaintiff, beginning some time near the close of A. D. 1869, I think, and during the year A. D. 1870, part of the year. I can't fix the time very accurately. I
135 was retained by her as her attorney to institute proceedings for the recovery of a tract of land lying in La Porte County, Indiana, which she had conveyed to one Magdaline Everhart.

Int. 4. State generally what you did in reference to instituting the legal proceedings.

Ans. I went to La Porte, Indiana, and made inquiries for the person, Magdaline Everhart, mentioned in the deed, and also procured from the recorder of La Porte County a copy of the deed made by one Graham, I have forgotten his christian name, to the plaintiff in this case. Also a copy of a deed purporting to have been made by the plaintiff and her then husband to Magdaline Everhart. I then made inquiries as to the location of the land and as to where I would probably find Magdaline Everhart. I procured conveyance at the livery stable, drove out to where I understood the land to be, and called at the house of a gentleman who was living near, whose name I have forgotten, and inquired for Mistress Everhart; they directed me to a place where they said I could find her, but on calling was told that she had returned to
136 the house of a daughter, living near La Porte. I returned, called at the house of the daughter, and found there a lady who said her name was Magdaline Everhart. I inquired of her if she was the owner of a tract of land which appeared to have been conveyed to her by the plaintiff and her husband. I told her my name and business. I stated that I was employed by Mrs. Sims, the plaintiff, to call on her in reference to that land. I stated that Mrs. Sims, the plaintiff, disaffirmed the deed on the ground that she was a minor when it was made and desired to know of Mrs. Everhart whether she would in any way compromise by surrendering a portion of the land and retaining the remainder; this she refused to do. I then made a formal demand on behalf of Mrs. Sims for the possession of the land conveyed by her to Mrs. Everhart; this she refused to grant, and refused to give me up possession. I then left her and subsequently commenced an action in the La Porte circuit court in connection with B. W. Ellis, of this city, for the recovery of possession of the land conveyed by Mrs. Sims, the plaintiff, to Everhart.
137 That I believe terminated my connection with the business. I will state however that Mrs. Everhart stated that James Bradley, of La Porte, was her attorney, and I subsequently wrote a letter to Judge James Bradley, asking in substance whether they would compromise that matter or do anything about it; and, if so, what they would do; to which I received a reply, signed James Bradley, stating that they would do nothing about it. This letter was written and the reply received before I commenced the action. The copy of the letter I sent to Mr. Bradley and the letter I received from him in reply were destroyed by fire.

Int. 5. Will you please fix the time as near as you can when you visited Mrs. Everhart, and when you commenced the legal proceedings of which you have spoken?

Ans. I should say without meaning to be perfectly accurate that it was in the month of March, A. D. 1870. I am not certain as to the day. I have no means of fixing the day that I visited Mrs. Everhart. The suit was commenced after that, but I have no means of fixing the
138 time except from the filing of the complaint, a paper purporting to be a copy of which is now before me, which states the filing of

the complaint to be on the eleventh of April, A. D. 1870. From recollection I should state that it was somewhere about that time that I filed the complaint.

Int. 6. Will you please examine particularly the paper purporting to be a copy of the complaint to which you have alluded in your last answer, and state whether or not according to your best recollection that is a copy of the complaint filed, and whether or not the description of the property therein contained is the same property concerning which you had conversed with Mrs. Everhart and made the demand for the possession of?

Ans. I have no means of knowing definitely whether it is or not. The description of the land in the original complaint I think was accurate, as I took it from the deed purporting to have been given by Mrs. Sims, the plaintiff, and her husband to Mrs. Everhart. Whether this is an exact copy of that I have no means of telling. I should say from
139 its general appearance and from my general recollection of the complaint filed that it might be a copy. I will attach the paper referred to as Exhibit A to my deposition, upon which paper I have written my name.

Int. 7. Please state how you obtained a description of the property concerning which you conversed with Mrs. Everhart, and which you subsequently embodied in the complaint filed in the La Porte circuit court on behalf of the plaintiff against Mrs. Everhart.

Ans. I obtained it from copies of two deeds, one made by a man by the name of Graham, who described himself, I think, as father of the plaintiff, to the plaintiff, and the other a copy of a deed purporting to be made by the plaintiff and her husband to Magdaline Everhart. These copies of deeds I obtained from the recorder of La Porte County, Indiana, and were certified by him to be correct copies of the originals as recorded in his office.

Int. 8. State whether you have now in your possession the copies of deeds referred to in your last answer. And if not, what has become of the copies as far as you know?

140 Ans. I have not got them. I think I handed them to the plaintiff, and have no knowledge of their whereabouts now.

Int. 9. Please state what, if anything, you did on behalf of the plaintiff in reference to the recovery of the land in controversy in this suit. I mean particularly in reference to a notice of the disaffirmance of the deed purporting to be from the plaintiff and her husband to Magdaline Everhart, and the demand for the possession of the property described in that deed.

Ans. I think I stated in my answer to interrogatory fourth substantially what was done and said to Mrs. Everhart at the time I called on her. I think I had the copy of the deed from plaintiff and her husband to Mrs. Everhart at the time, and stated to Mrs. Everhart that my demand was for the possession of the property described in that deed, on the ground that the plaintiff was a minor at the time of the execution and delivery of the deed, and that she, the plaintiff, had disaffirmed the deed on the ground that she was a minor when the deed was made and executed and delivered. I stated furthermore that this was
141 a formal demand made with reference to the commencement of a suit for the recovery of the land.

Int. 10. Did you ever commence any other suit in the county of La Porte, Indiana, than the one you have before referred to in this deposition?

Ans. I never commenced but the one suit for Mrs. Sims that I have

any recollection of in La Porte County. I am sure that I never commenced but one for her.

Cross-examination by F. CHURCH, who appeared for the defendants at the taking of this deposition:

Cross-int. 1. How many times did you ever meet Mrs. Magdaline Everhart?

Ans. Only the once.

Cross-int. 2. How far from La Porte was it that you met her on that occasion?

Ans. I am not able to say exactly. I should it was about a mile or three-quarters.

Cross-int. 3. How far was she from the land then in controversy at the time you met her?

Ans. I was informed that the land was about nine miles from
142 La Porte, and that she was somewhere in the neighborhood of eight miles from the land. I only know from information.

Cross-int. 4. Were you on that day, or at any other time, at or on the land in controversy; if not, how near were you to the land?

Ans. I was not on it that I am aware of. It was pointed out to me as being at a distance of three-quarters of a mile or a mile, I should think, at the nearest place that I was to it.

JAMES M. FLAGG.

S. M. MILLARD,
Notary Public.

EXHIBIT A.

In the La Porte circuit court, April term, 1870.

STATE OF INDIANA,
La Porte County:

ANNA MARIA SIMS
vs.
MAGDALINE EVERHART. } Complainant to quit title.

Anna Maria Sims, the plaintiff in this action, complains of Magdaline Everhart, the defendant, and says that she is the owner in fee of following described real estate, to wit: the east half of the southwest quarter of section thirty-four, in township thirty-seven north, of range two west, in La Porte County, in the State of Indiana; that the defendant claims to have some title to or interest in or to the same, and she is also
143 now in possession of the same, and has been for more than six years last past, and that the rents and profits of said land are worth five hundred dollars for each and every year.

And the plaintiff further states that she, the said defendant, claims ownership and title to said property by virtue of a certain deed executed by the plaintiff and one John B. Sims, then the husband of the plaintiff, on the 28th day of May, A. D. 1847, and the plaintiff avers that at the time of the execution of the said deed she was an infant, under the age of twenty one years.

And the plaintiff further avers that she was married to said John B. Sims on or about the fourth day of July, 1844, and lived and continued to be his wife all the time from the date of her said marriage until the 14th day of February, A. D. 1870, when she was divorced from her said

husband, John B. Sims, for the default and misconduct of her said husband.

And she further avers that she has disaffirmed her said deed to the said defendant and demanded possession of the said above-de-
144 scribed land of the said defendant, which she refused to grant.

Therefore the plaintiff asks the court to decree and adjudge her said above described deed to the defendant to be null and void, and that the said plaintiff is the owner in fee of the said land; that she is entitled to the possession of the same, and that the defendant be decreed to deliver possession thereof to the plaintiff; that her title thereto be quieted, and that she recover of the defendant the sum of one thousand dollars for the detention thereof, and for other proper and requisite relief.

JAMES M. FLAGG,
B. W. ELLIS,
Attorneys for Plaintiff.

JAMES M. FLAGG.

EXHIBIT A.

In the La Porte circuit court, April term, 1870.

STATE OF INDIANNA,
La Porte County:

ANNA MARIA SIMS
vs.
MAGDALINE EVERHART. } Complaint to qui't title.

Pleas began and held at the court-house, in the city and county of La Porte and State of Indiana, on Monday, the first day of April, A. D. 1870, before the honorable Andrew L. Osborne, judge of the cir-
145 cuit court within and for the ninth judicial circuit of the State of Indiana, of which the said county of La Porte forms a part.

Be it remembered that heretofore, to wit, on the 1st day of April, A. D. 1870, the said plaintiff, by James M. Flagg and B. W. Ellis, her attorneys, filed in the clerk's office of the La Porte circuit court her complaint in writing against said defendant in these words, to wit:

In the La Porte circuit court, at April term, 1870.

STATE OF INDIANNA,
La Porte County:

ANNA MARIA SIMS
vs.
MAGDALINE EVERHART. } Complaint to qui't title.

Anna Maria Sims, the plaintiff in this action, complains of Magdaline Everhart, the defendant, and says that she is the owner in fee of the following described real estate, to wit: The east half of the southwest quarter of section thirty-four, in township thirty-seven north, of range two west, in La Porte County, in the State of Indiana; that the defendant claims to have some title to or interest in or to the same. And she is also now in possession of the same, and has been for more
146 than six years last past, and that the rents and profits of said land are worth five hundred dollars for each and every year.

And the plaintiff further states that the said defendant claims ownership and title to said property by virtue of a certain deed executed by the plaintiff and one John B. Sims, then the husband of the plaintiff, on the 28th day of May, 1847. And the plaintiff avers that at the time of the execution of the said deed she was an infant under the age of twenty-one years.

And the plaintiff further avers that she was married to said John B. Sims on or about the fourth day of July, 1844, and lived and continued to be his wife all the time from the date of her said marriage until the 14th day of February, A. D. 1870, when she was divorced from her said husband, John B. Sims, for the default and misconduct of her said husband.

And she further avers that she has disaffirmed her said deed to the said defendant, and demanded possession of the said above-described land of the said defendant, which she refused to grant.

147 Wherefore the plaintiff asks the court to decree and adjudge her said above-described deed to the defendant to be null and void, and that the said plaintiff is the owner in fee of said land; that she is entitled to the possession of the same, and that the defendant be decreed to deliver possession thereof to the plaintiff, that her title thereto be quieted, and that she recover of the defendant the sum of one thousand dollars for the detention thereof, and for other proper and requisite relief.

JAMES M. FLAGG AND
B. W. ELLIS,
Attorneys for Plaintiff.

Thereupon a summons issued out of the clerk's office of said court directed to the sheriff of La Porte County, which summons is in the words and figures following, to wit: The State of Indiana to the sheriff of La Porte County: You are commanded to summon Magdaline Everhart to appear in the La Porte circuit court on the second day of the next term thereof to answer the complaint of Anna Maria Sims, and of this summons make due return.

Witness the clerk and seal of the court this 1st day of April, 1870.

148 [SEAL.] JAMES H. SHANNON, *Clk*,
By H. C. SHANNON, *Deputy*.

Which summons was afterwards returned by the sheriff of said county, with the following return endorsed thereon, to wit:

Served by reading to the within-named defendant, April 5th, 1870.
J. D. PHELPS, *Sheriff L. C.*,
By WM. H. H. WHITEHEAD,
Deputy.

And afterwards, to wit, on the 23rd day of April, A. D. 1870, a subpœna issued out of the clerk's office of said county, directed to the sheriff of La Porte, in these words, to wit: The State of Indiana to the sheriff of La Porte County: You are commanded to summon Broderick Bunton, Mrs. John Martin, Mrs. Wm. Gilchrist, and Jacob Miller, to appear in the circuit court of La Porte County, on the 4th day of May, 1870, to testify in action wherein Anna Maria Sims is plaintiff

and Magdaline Everhart is defendant, on behalf of the defendant, and return this summons.

Witness this 23rd day of April, 1870.

JAMES H. SHANNON, *Clerk*,
By H. C. SHANNON, *Deputy*.

Which subpœna was afterwards returned by the sheriff, with the following return endorsed thereon, to wit:

149 Served by reading to each of the within named witnesses, April 25th, 1870.

J. D. PHELPS, *Sheriff L. C.*,
By WM. H. H. WHITEHEAD,
Deputy.

And afterwards, to wit, on the 27th day of April, A. D. 1870, the same being the 3rd judicial day of the April term of said court, holden as aforesaid, before the judge aforesaid, the following proceedings were had in this cause, to wit:

ANNA MARIA SIMS
vs.
MAGDALINE EVERHART.

Now come the parties, by counsel, and the defendant files an affidavit of the non-residence of the plaintiff and moves the court for a bond for costs, and the plaintiff is ruled to file a bond for costs by to-morrow.

And afterwards, to wit, on the 11th day of May, A. D. 1870, the same being the 15th judicial day of the term and court aforesaid, the following further proceedings were had in this cause, to wit:

ANNA MARIA SIMS
vs.
MAGDALINE EVERHART.

150 Now comes the defendant, by counsel, and the plaintiff is three times called, and comes not, but herein makes default; thereupon this cause is dismissed.

It is therefore considered by the court that the defendant recover of said plaintiff her costs herein expended, taxed at dollars and cents.

STATE OF INDIANA,
La Porte County:

I, Charles Spaeth, clerk of the La Porte circuit court, within and for said county and State, do hereby certify the within and foregoing to be a full, true, and complete transcript of all the papers filed, proceedings had, and judgements of the court in the within-entitled cause, as the same appears of record in my office.

Witness my hand and the seal of said court hereunto affixed at my office in La Porte this 16th day of December, A. D. 1874.

[SEAL.]

CHA'S SPAETH,
Clerk,
By JA'S T. HOPKINS,
Deputy.

Depositions of Michael Brand and Isaac B. Coplin. Examined by
151 Wm. B. Biddle, attorney for plaintiff.

Said MICHAEL BRAND, being duly sworn to testify the truth, the whole truth, and nothing but the truth, relating to said cause, deposed as follows:

Ques. 1. State your name, age, residence, and occupation.

Ans. Michael Brand is my name; I am of the age of sixty-eight years; my residence is at La Porte, Indiana; by occupation I am a farmer.

Ques. 2. State how long you have lived in La Porte, where you resided immediately previous to coming to said city, and how long you lived at said former place of residence.

Ans. I have lived in the city of La Porte something over 22 years. Immediately previous to coming to said city I resided in Kankakee, in La Porte County, Indiana. I lived there in said township for about twenty years, but for the first two years I was transient and there only off and on.

Ques. 3. State whether you are acquainted with the parties to this suit or any of them.

Ans. I am slightly acquainted with some of the parties.

Ques. 4. State whether you have at any time been acquainted
152 with a man by the name of Hugh Graham; and if yea, state where he resided at the time you knew him, and also state whether you were acquainted with Mrs. Magdaline Everhart in her lifetime.

Ans. I was acquainted with Hugh Graham. When I knew him he lived about a mile and a half east of Bald Hill, which is east by southeast of La Porte, about three miles, in La Porte County, Indiana. I was not personally acquainted with Mrs. Everhart, but think I have seen her a few times.

Ques. 5. Do you know where Mrs. Everhart lived? And if yea, state as definitely as you can.

Ans. I did not know where she lived.

Ques. 6. State whether you were acquainted with the character or quality of the east half of the southwest quarter of section thirty-four (34) in township thirty-seven (37) north, of range two (2) west, in the county of La Porte, and State of Indiana; and if yea, state how long you have known said land.

Ans. I think I knew it before it was improved, but I think I paid no special attention to the land before the last twenty or twenty-five years.

153 Ques. 7. State how near you have resided to said land, and whether you are acquainted with the rental value of land in that vicinity.

Ans. I have resided on that section east of the one referred to, and think it was about one mile and a quarter or a mile and a half. I am acquainted with the rental value of land in that vicinity.

Ques. 8. State who has had possession of said land during the time you have known it, and in what condition it is for the purpose of agriculture.

Ans. For the last several years it has been occupied by Mr. Samuel Darlington. I cannot be positive, but I think he has resided there for the last twelve or fifteen years. The land has been in the condition that farms are ordinarily in in this vicinity.

Ques. 9. Please describe the improvements, if there are any, upon said land, and state when said improvements were made.

Ans. There is a frame house, of middling size for a farm house, upon said land; it stands about thirty rods from the road on the north
154 side. I think I was never in the house but once. I think the house is a story and a half house, but am not positive. There is a small frame barn on said land which is in good repair, having been newly shingled and sided within the last three years. There is also an orchard on the land of about eighty or one hundred apple trees. It is my impression that there is an old plank fence along the south side, next to the road. I do not know positively whether the whole eighty acres is improved or not. I have never been on the back part of the place. It is my impression that at least sixty acres of said land is under cultivation, and it may be that the whole is under cultivation. It is all in cultivation down to the marsh; whether that includes the whole eighty I do not know. I cannot say just how long the improvements have been made, but think I am safe in saying that the improvements were made twenty years ago. The apple trees look as if they were at least that old. I do not know whether Mr. Darlington was the first occupant of it or not.

Ques. 10. State when and by whom said land or any part of it was first cultivated.

Ans. I do not know positively.

155 Ques. 11. State how much of said land was in cultivation at the time of your earliest definite recollection of said land, and what buildings, if any, were then on it.

Ans. I have no recollection before the time Mr. Darlington went there.

Ques. 12. State what would be the rental value or the value of the rents and profits of said land from the time of your earliest recollection of it as improved until the present time.

Ans. For the last fifteen years I would estimate the gross rents at four dollars per acre, and for the ten years prior to the last fifteen years I would estimate the gross rents at three dollars per acre. For the last fifteen years I would deduct for expenses and repairs the sum of one dollar per acre, and for the former period of ten years I would deduct for expenses and repairs seventy-five cents per acre, making the net proceeds per year for said ten years two dollars and twenty-five cents per acre, and for the last fifteen years three dollars per acre. In explanation I would say that there is nearly always rails wanting
156 and repairs of various kinds to be made, and it is guess-work for me to some extent. In estimating expenses I took into consideration the natural decay of fences, houses, and all improvements.

Cross-examination:

The defendants appear by James Bradley and Wm. H. Calkins, and so far as may be save all questions as to the sufficiency of the notice, and desire the cross-examination to be taken to be used conditionally only, and cross-examine as follows:

Ques. 1. State who erected the house and barn on the land, if you know.

Ans. I don't know positively.

Ques. 2. About what year were they erected?

Ans. I don't think I have any recollection of them longer ago than about twenty or twenty-five years.

Ques. 3. Were they on the place then?

Ans. There was a house and barn there between twenty and twenty-five years ago, according to my best recollection.

Ques. 4. Were they the same that are there now?

Ans. Those that are there now are the first that I recollect of.

Ques. 5. Was the whole place fenced in about that time, before
157 or after the erection of the house?

Ans. I have no knowledge of the whole inclosure. I have knowledge mostly of the south side. The south side where the house was fenced in at that time to the best of my recollection.

Ques. 4. Who then occupied the premises?

Ans. I do not know for some years.

Ques. 5. Who was the first person you recollect of occupying the premises?

Ans. Mr. Samuel Darlington.

Ques. 6. Has there been any improvements put upon the place since Mr. Darlington occupied it; if so, what?

Ans. I have no recollection of any.

Ques. 7. Is the land in pretty much the same condition now with reference to improvements as it was twenty or twenty-five years ago—that is, are the improvements better or worse?

Ans. I think the improvements are in a less valuable condition than they were twenty-five years ago.

Ques. 8. Was the orchard upon the place twenty or twenty-five years ago?

Ans. My impression is that it was.

Ques. 9. Are the fences the same that were on the land twenty or twenty-five years ago?

158 Ans. I do not know.

Ques. 10. Is not three dollars an acre a high estimate of the rental value of the land in controversy, estimated as a nett income over and above repairs and necessary outlays during the last fifteen years?

Ans. I would think not.

Ques. 11. You may state if you own a farm in the neighborhood of this land and whether the quality of the land is similar.

Ans. I own a farm about a mile and a half from this land, and from my knowledge of this land I think there is little difference in quality.

Ques. 12. How long have you rented your farm?

Ans. I have two small farms. One I have rented most of the time for thirty-five or forty years, and the other one for twenty-two years.

Ques. 13. Have your farms during the last fifteen years netted you over and above all outlays and expenses, natural wear and decay, an income equal to three dollars per acre?

Ans. I should think so.

159 Ques. 14. How do the improvements on this land compare with the improvements on your farm?

Ans. The improvements on my farm I think are better than on this land.

MICHAEL BRAND.

Said ISAAC B. COPLIN, being duly sworn to testify the truth, the whole truth, and nothing but the truth, relating to said cause, deposes as follows:

Ques. 1. State your name, age, residence, and what has been your occupation during the last twenty-five or thirty years, and where have you resided during that period.

Ans. My name is Isaac B. Coplin. My age is fifty-seven years. My residence is now at this place, La Porte, Indiana, but until a year ago

last April, for over thirty years I lived about five miles east of this place. For the last twenty-five or thirty years my occupation has been principally farming.

Ques. 2. State whether, at any time since you resided in this county, you were acquainted with one Hugh Graham and one John B. Sims; and if yea, state when you knew them and where they resided.

160 Ans. I was acquainted with Hugh Graham; he was living on his farm about five miles east of this place when I moved into the neighborhood, and he lived there for several years afterwards. I was acquainted with John B. Sims. He resided on the place now in controversy when I knew him. I knew him five or six years after I moved on my farm, and that was in the year 1839.

Ques. 3. State what relationship existed between said Sims and said Graham during the time you knew them.

Ans. Sims was the son-in-law of Graham.

Ques. 4. What was the name of the wife of said Sims, and what do you know as to her identity with the plaintiff in this case?

Ans. Her name when I first knew her was Anna Graham—afterwards Anna Sims. I think she had a middle name, but she went by the name of Anna. I suppose that Anna Sims, the wife of said John B. Sims, is the same person who is plaintiff in this action.

Ques. 5. State how long the said Sims continued to live upon the land in controversy in this case; what improvements there
161 were upon it when he took possession, and what improvements he made thereon.

Ans. I cannot state the precise time he lived there. My impression is that he lived there from one to two years. I do not think there were any improvements when he took possession except that the south half was fenced and under cultivation. Sims began the building of a house during the time he was in possession, but I think he did not quite finish it.

Ques. 6. Describe the quality of the land composing the north half of said tract.

Ans. It was burr-oak openings and rather uneven broken land.

Ques. 7. State what portion, if any, of said tract of land is marsh.

Ans. No part of it.

Ques. 8. State who next occupied said land after said Sims left it, and who has been in possession of it from that time until the present.

Ans. Samuel Darlington lived on said land immediately after Sims left it, and with the exception of a year or two has occupied it ever since.

Ques. 9. State whether you were acquainted with Magdaline
162 Everhart in her lifetime, and where she resided, and what relationship existed between her and the said Darlington.

Ans. I was acquainted with Magdaline Everhart; she resided part of the time with Samuel Darlington, and part of the time with Samuel Burson, and part of the time with her son William. Samuel Darlington was her son-in-law.

Ques. 10. State whether you were acquainted with the defendant Margaret Darlington, and state what relation she is to said Samuel Darlington.

Ans. I am acquainted with her; she is the wife of said Samuel Darlington.

Ques. 11. State whether you are acquainted with the rental value of lands in the vicinity of the land in controversy.

Ans. I am some acquainted with the rental value of lands in the vicinity of said land.

Ques. 12. State what would be the value of the rents and profits of said land, with the improvements thereon, at the time said Sims left it until the present time.

Ans. I would estimate the nett profits and rents of said land,
163 from that time to the present, to be of the annual value of two and one-half dollars per acre.

Ques. 13. For what portion of said land do you make that estimate?

Ans. I had reference to the whole tract.

Ques. 14. State what improvements have been made upon said land since said Sims left it.

Ans. My impression is that there has been a barn built there since, and also a kitchen to the house. The orchard was planted after Darlington went there. I think that a part of the north forty acres was first cultivated after Darlington moved there. The north half was burr-oak openings, and before it was cleared had a few scattering burr-oaks upon it.

The defendants appear by Jas Bradley and W. H. Calkins, and, as far as may be, save all questions as to sufficiency of the notice, and desire the cross examination to be taken and to be used conditionally only, and cross-examine as follows:

Ques. 1. State what other improvements were made upon the place after Darlington moved on it, besides those you have stated.

164 Ans. There has been considerable fencing done. The south fence was moved to make a cross fence, and a good board fence was built along the south end, and it is my impression that they built a better fence around the north part than there was there when Darlington went there.

Ques. 2. What is the value of the kitchen part built to the house as you have stated?

Ans. I cannot state exactly; probably fifty or seventy-five dollars.

Ques. 3. What is the value of the barn?

Ans. Such a barn, I presume, could be built for about four hundred dollars.

Ques. 4. What is the value of the orchard?

Ans. I consider that it would increase the value of the farm a hundred dollars.

Ques. 5. What is the value of the fences over and above the value of the fences at the time Darlington went into possession?

Ans. It is hard for me to answer that question. Some of the fences are better and some are worse.

Ques. 6. What is the value of all other improvements put upon it by Darlington?

Ans. Probably one hundred dollars.

165 Ques. 7. How often have you seen or known of the plaintiff being back here in La Porte since 1847?

Ans. I have seen her here twice, and probably she has been here more.

Re-examination by counsel for plaintiff:

Ques. 1. State how you estimate the value of the barn on said premises when you fix it at four hundred dollars.

Ans. I think a new one like it could be built for that sum.

Ques. 2. When was said barn built, and what is its present value compared with a new barn of similar dimensions?

Ans. My impression is that the barn was built the first year after Darlington moved on the place, but the exact year I cannot state; and about two years ago they repaired it all over, so that it is in pretty good repair at present. A new barn like it would probably be worth a hundred dollars more. This is only guess-work. I have not examined the barn to be able to judge accurately, and give my opinion from a passing view.

Ques. 3. What other improvements had you reference to in an-
166 swer to cross-interrogatory 6th, which you value at one hundred dollars?

Ans. A smoke-house and some extra fencing.

I. B. COPLIN.

EXHIBIT B.

I, Magdaline Everhart, of La Porte County, in the State of Indiana, being in sound mind and disposing memory and understanding, do make and publish this my last will and testament in the manner and form following, that is to say:

First. I order and direct that my funeral expenses and all my just debts be paid by my executors, hereinafter named, as soon after my decease as the same can be done, out of my money that may come to their hands.

Second. I authorize and empower my executors, hereinafter named, to sell any and all of my estate, real and personal, for the best price that can be had therefor, either at public or private sale, and to execute to the purchaser all necessary and proper deed of conveyance therefor as fully as I could do the same if living.

Third. I give, devise, and bequeath to my daughter, Elizabeth
167 E. Burson, the sum of eight hundred and eighty-one dollars, to be paid to her out of the first money that may come to the hands of my executors after the payment of my debts and funeral expenses.

Fourth. I order and direct that all of my property of every kind be sold, and after the payment of my debts and funeral expenses, and the legacy above named to my daughter, Elizabeth E., I order and direct that all the residue thereof be divided into three equal parts, and I give and bequeath one equal one-third part thereof to my daughter, Elizabeth E. Burson, to her and to her heirs forever. I give and bequeath to my son, William Everhart, one other equal one-third part thereof, to him and his heirs forever. And I order and direct that the other equal one-third part thereof be loaned at interest by my executors during the natural life of my daughter, Margaret Darlington, and that the annual interest thereof be paid to her during her life, and at her death that the principal be divided among her children, share and share alike.

Fifth. I release my son, James Everhart, from the payment of
168 any interest that may have become due to me during my life and be unpaid at the time of my death.

Sixth. I have given nothing to the children of my deceased son, Conrad Everhart, for the reason that the said Conrad had received his full share during his lifetime.

Seventh. I appoint my daughter, Elizabeth E. Burson, and my son, William Everhart, the executors of this my last will and testament, and I hereby revoke and annul all former or other wills by me made, and I hereby ordain this alone as and for my last will and testament.

Witness my hand and seal this tenth day of June, A. D. 1865.

MAGDALINE EVERHART. [SEAL.]

Signed, sealed, and published by the said testatrix as her last will and testament in our presence, who, at her request, and in her presence, and in the presence of each other, have subscribed our names hereto as witnesses.

W. A. PLACE.
JAMES BRADLEY.

169 EXHIBIT C.

This indenture, made the twenty-eighth day of January, in the year of our Lord one thousand eight hundred and thirty-six, between Ransom Willard, of the county of La Porte and State of Indiana, of the first part, and Hugh Graham, of the county and State aforesaid, of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of five hundred and fifty dollars lawful money of the United States to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged by the said party of the first part, has granted, bargained, sold, aliened, released, conveyed, and confirmed, and by these presents doth grant, bargain, sell, alien, release, convey, and confirm unto the said party of the second part, his heirs and assigns, forever, all that tract or parcel of land lying and being in the county of La Porte and State of Indiana, to wit, the east half of the southwest quarter of section thirty-four, in township thirty-seven north, of range two west, containing eighty acres, more or less. To have and to hold

170 the above-described premises hereby sold and conveyed unto the said Hugh Graham, his heirs and assigns, forever, together with all and singular the appurtenances thereunto belonging or in any way appertaining, to his own proper use and behoof. And the said party of the first part, for himself, his heirs, executors, and administrators, that the said party of the first part is the true and lawful owner of the said premises and has good right, full power, and lawful authority to sell and convey the same in manner and form aforesaid; and further that he the said party of the first part, for himself, his heirs, executors, and administrators, will warrant and forever defend the aforesaid tract of land with the appurtenances and every part thereof to the said party of the second part, his heirs, executors, administrators and assigns, against the legal claim or claims of all and every person whomsoever

In testimony whereof the said Ransom Willard has hereunto set his hand and seal the day and year first above written.

RANSOM WILLARD. [SEAL.]

Signed, sealed, and delivered in presence of—
WILLIAM O. ROSS AND
MICHAEL S. NEWHILL.

171 STATE OF INDIANA,
La Porte County, ss:

Before me, William O. Ross, a justice of the peace within and for said county, personally came Ransom Willard, the above named grantee, and acknowledged the above deed of conveyance to be his act and deed for the purposes and uses therein mentioned. In witness whereof I have hereunto set my hand and seal this 28th day of January, A. D. 1836.

[SEAL.] WILLIAM O. ROSS,
Justice of the Peace.

EXHIBIT.

This indenture, made this third day of April, in the year of our Lord one thousand eight hundred and forty-five, between Hugh Graham, of the county of La Porte and State of Indiana, of the first part, and Ann Mariah Sims, late Ann Maria Graham, of the county of La Porte and State of Indiana, of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of one thousand dollars, lawful money of the United States,
172 to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, hath granted, bargained, sold aliened, demised, released and confirmed, and by these presents doth grant, bargain, sell, alien, release, demise, and confirm unto the said party of the second part, her heirs and assigns forever, all the east half of the southwest quarter of section number thirty-four (34) in township number thirty-seven (37) north, of range number two (2) west, in La Porte County, Indiana, containing eighty acres. This conveyance is made subject to a mortgage to the State of Indiana for four hundred dollars, together with all and singular the hereditaments and appurtenances thereunto belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof. To have and to hold the hereinbefore granted premises with the appurtenances unto the said party of the second part, her heirs and assigns forever; and the said party of the first part for himself and for his heirs, executors, and administrators doth covenant, grant, bargain, and agree to and with the said party of the second part and her
173 heirs and assigns that at the time of the ensealing and delivery of these presents he is lawfully seized of the premises above conveyed as of a good, sure, perfect, absolute and indefeasible estate of inheritance in the law in fee simple, that the same was then and still is clear of all incumbrance of any nature whatever, and except as above stated, that the above bargained premises, in the quiet and peaceable possession of the said party of the second part, her heirs and assigns, against all and every person or persons lawfully claiming the same or any part thereof, will forever warrant and defend.

In witness whereof the said party of the first part to these presents doth hereunto set his hand and seal the day and year first above written.

HUGH GRAHAM. [SEAL.]

Written, sealed and delivered in presence of—
JOHN B. NILES.

STATE OF INDIANA,
La Porte County, ss:

Be it remembered that on the 3rd day of April, in the year of our Lord one thousand eight hundred and forty-five, personally appeared before me, the undersigned, a master in chancery, within and for
174 said county, by authority of law duly commissioned and qualified, the above-named Hugh Graham, known to me to be the person who executed the above indenture, and acknowledged that he did sign, seal and deliver the same as his free and voluntary act and deed for the purposes above mentioned.

In testimony whereof I have hereunto set my name and affixed my seal the day and year last above written.

[SEAL.]

JNO. B. NILES,
Master in Chancery.

In the United States circuit court for the district of Indiana, November term, 1873.

ANNA MARIA SIMS
vs.
WILLIAM EVERHART AND OTHERS.

For the purpose of the trial of the above-entitled cause it is agreed that the land in controversy, to wit: The east half of the southwest quarter of section 34, in township 37 north, of range two west, in La Porte County, Indiana, was duly entered on the 27th day of August, 1835, by Samuel Kerr, and that a patent therefor was issued by the Government of the United States to Ransom Willard, assignee of said Kerr, on the 2nd day of September, 1839.

175 That said Willard, on the 28th day of January, 1836, executed and delivered to Hugh Graham a deed, with full covenants of warranty, conveying the same premises.

That said Graham, on the 3rd day of April, 1845, executed and delivered to the plaintiff, Anna Maria Sims, a deed conveying to her the same premises with full covenants of warranty, except as to a mortgage for $400.00 to the surplus revenue fund.

It is further agreed that the copies of said deeds hereto attached marked Exhibits A and B, shall be received in evidence on the trial of said cause for the purpose of proving any and all facts therein stated as fully and amply as would the original deeds after proof of the execution of the same.

It is further agreed that the defendants shall produce on the trial for the use of the plaintiff as well as of the defendants themselves the original deed from the plaintiff and her late husband to Magdaline Everhart, dated May 29th 1847, for the same premises. The said deed with the certificate of the recorder thereon as to date of its record to

176 be received in evidence without proof of execution.

It is further agreed that either party may produce on the trial of this cause, for the use of both parties, the original will of Magdaline Everhardt, and that it shall be with the proofs thereto attached, received in evidence without further proof, and it is admitted that said will was duly admitted to probate before the clerk of the La Porte court of common pleas on the day of the date of the affidavits thereto attached, and letters testamentory issued thereon to the defendants William Everhart and Elizabeth E. Burson, who on that day qualified and entered upon their duties as such executors and are still acting as such.

Nov. 5, 1873.

W. H. CALKINS,
Att'y for Def'ts.
WEIR AND RIDDLE.

Defendants' testimony.

Deposition of A. L. Osborne.

ANDREW L. OSBORNE, of lawful age, being first duly sworn, deposes and says as follows:

Interrogated first by defendant.

Int. 1. State your name, age and present occupation?

177 Ans. My name is Andrew L. Osborne; am 59 years of age, and a lawyer by profession; reside at La Porte, Indiana.

Int. 2. Are you acquainted with the defendants to this suit? If so, how long?

Ans. I am acquainted with all of them except Mrs. Darlington. Have known them 30 years and upwards.

Int. 3. Are you acquainted with the complainant, Ann Maria Sims? If yea, state particularly the circumstances under which you became acquainted with her, or met her, and state fully.

Ans. I saw her once; she came into my office in La Porte, with her husband and Samuel Burson, relative to the purchase of some land by Mrs. Magdaline Everhart, in La Porte County, Indiana. Burson was the son-in-law and agent of Mrs. Everhart, the purchaser of the land, and was negotiating with Mrs. Sims for the purchase of the land. The question was asked whether she was twenty-one, and she was told that if she was not she could not make a valid sale of the land so but that she could set it aside after she became of age. She replied that she was and gave the date or time at which she became 21.

178 Int. 4. Have you any doubt that the person who came into your office was Annie Maria Sims, and you may state what, if anything, causes you now to believe it was said person?

Ans. She came in with John B. Sims, whom I knew, and they claimed at the time to be husband and wife, and I knew her father, Hugh Graham, and we talked about him. I had no reason to doubt that she was the person she claimed to be.

Int. 5. Will you please look upon the paper now shown you and state what it purports to be, the names of the persons who are parties to it, the date of it, and also what, if any, paper writing is attached to it, and in whose handwriting it is, and how it came to be drawn, and particularly how the writing attached to the deed came to be drawn?

Ans. I have the paper in my hand; it purports to be a deed of conveyance executed by John B. Sims and his wife, Ann M. Sims, to Magdaline Everhart, dated May 28th, 1847, acknowledged before Samuel E. Williams, justice of the peace in La Porte County, Indiana, for

179 the east half of the southwest quarter of section No. 34, in township No. 37 north, of range No. 2 west, in La Porte, Indiana, con aining 80 acres, subject to a mortgage to the State of Indiana for $400.00, to the surplus revenue fund, executed by Hugh Graham, and one year's interest. The deed was fill'd out by me. The paper or written statement on the same sheet, and below the acknowledgement, purports to be a statement made by Ann M. Sims, that before the delivery of the deed and before the payment of the money or any part of it, as an inducement to Mrs. Everhart to consum'ate the bargain, and a declaration that she was 21 years of age on the 25th day of September, 1846. That statement was also written by me, and both the deed and that statement are in my handwriting. As I have before stated in another answer, the age of Mrs. Sims was talked about and some questions were asked by Mr. Burson as to her being 21 years of age. She affirmed positively that she was, and I thought it prudent to make the written statement for her to sign. She certainly understood and knew that Mr.

180 Burson would not conclude the bargain until she satisfied him that she was 21. He acted upon her statement.

Int. 6. You may state where the said Burson now is; whether dead or alive; and in what capacity and for whom he was acting in the sale and purchase of said land.

Ans. He is dead. He died in 1858. He was acting as the agent of Mrs. Magdaline Everhart.

Int. 7. You may state whether the complainant, Mrs. Anna Maria Sims, was present when you wrote the said deed and the said statement, and whether they were both written at the same time.

Ans. I can't state positively that she was present at the writing of the said papers; my best recollection is they all remained there while I wrote the deed and the statement, and that they took it and went away with it. They were both written at the same time. As to that last statement I can't say positively that they were both written at the same time, and yet it seems to me as if they were. They are both in the same handwriting, same ink, and both bear the same date. I
181 certainly have no recollection of writing at different times, and know that I did not write the statement after the execution of the deed. I am equally certain that I did not make false dates.

Int. 8. You may state your best recollection as to who furnished you the information written in said statement that Anna Maria Sims was 21 years of age on the 25th day of September, A. D. 1846.

Ans. The woman who came in with John B. Sims and Mr. Burson, claiming to be the wife of Sims.

Cross-examined by W. B. BIDDLE, solicitor for the plaintiff:

Int. 1. State whether the deed was signed by the parties executing the same, at the time you drew it or at any time afterwards, in your presence.

Ans. The deed was not signed at the time I drew it or at any other time in my presence. I have no personal knowledge about the execution of it.

Int. 2. Was it or was it not the purpose in drawing the statement appended to said deed to be signed by Mrs. Sims to conclude her
182 from denying the fact of her age as therein stated, rather than to embody therein a correct statement of her age?

(Objected to by defendant's counsel.)

Ans. No; my object in making the statement was to have a written statement of the facts as she had stated them to me and Burson, and upon which she knew he was acting, and that she might see and know that he was acting upon the truth of that statement. I know that Burson would not have made that purchase if he had not believed that statement to be true.

Int. 3. You will please state, as fully as you can recollect, what said Burson said in calling attention to the fact that he had learned or had reason to believe that Mrs. Sims was not then 21 years of age.

Ans. He did not say that he had learned nor that he had reason to believe that she was not 21. They only stated when they came in that that subject had been talked about, whether or not she was 21. And then the conversation which I have stated before took place. The
183 fact is, Burson had told me before that time that he talked of buying the land of Mrs. Sims, a daughter of Hugh Graham, and I asked him if he was sure she was 21. I had known Hugh Graham for several years before that time, and then afterwards the three came in together as I have before stated, but I cannot say it was on the same day.

Re-examined by defendants' counsel:

(The answers to cross-questions were made fuller than is responsive to the questions at the request of plaintiff's counsel.—C. H. WILSON, *Notary.*)

Int. 1. State what conversation was had at the time the said statement was made relative to whether Burson could safely purchase said

land, if said Mrs. Sims was under the age of 21, and what said Burson relied upon in making said purchase, if you know.

Ans. I told them that Burson could not safely make the purchase if she was not 21. The woman calling herself Mrs. Sims, and Burson both understood what I said. Burson relied on the statement that she was 21.

A. L. OSBORNE.

184 EXHIBIT D.

This indenture, made this twenty-eighth day of May, in the year of our Lord one thousand eight hundred and forty-seven, between John B. Sims and Ann Mariah Sims, his wife, of the county of La Porte, and State of Indiana, of the first part, and Magdaline Everhart, of the county of La Porte, and State of Indiana, of the second part, witnesseth:

That the said parties of the first part, for and in consideration of the sum of thirteen hundred dollars, lawful money of the United States, to them in hand paid by the said party of the second part, the receipt of which is hereby acknowledged, have granted, bargained, sold, demised, released, aliened and confirmed, and by these presents do grant, bargain, sell, demise, release, alien and confirm, unto the said party of the second part, her heirs and assigns, forever, all of east half of the southwest quarter of section number thirty-four (34), in township number thirty-seven (37) north, of range number two (2) west, in La Porte County aforesaid, containing eighty acres.

185 (This conveyance is made subject to mortgage to the State of Indiana for four hundred dollars to the surplus revenue fund, executed by Hugh Graham, and one year's interest.)

Together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; to have and to hold the hereinbefore granted, bargained, and described premises, with the appurtenances, unto the said party of the second part, her heirs and assigns, forever; and the said parties of the first part, for themselves and for their heirs, executors, and administrators, do covenant, grant, bargain, and agree to and with the said party of the second part, and her heirs and assigns, that, at the time of the delivery and ensealing of these presents, they are lawfully seized of the premises above conveyed, as of a good, sure, perfect, and indefeasible estate of inheritance in the law in fee simple; that the same was

186 then, and still is, free and clear of all incumbrance of any nature whatsoever, except as above mentioned; and that the above-bargained premises in the quiet and peaceful possession of the said party of the second part, her heirs and assigns, against all and every person or persons lawfully claiming the same, or any part thereof, will forever warrant and defend.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

JOHN B. SIMS. [SEAL.]
ANN M. SIMS. [SEAL.]

Signed, sealed, and delivered in the presence of—the words "except as above mentioned"—

SAM'L E. WILLIAMS.

STATE OF INDIANA,
Laporte County, ss:

Be it remembered that on the twenty-eighth day of May, in the year of our Lord one thousand eight hundred and forty-seven, personally appeared before me, the undersigned, a justice of the peace within and for said county, by authority of law duly commissioned and qualified, the above named John B. Sims and Ann Maria Sims, his
187 wife, known by me to be the persons who executed the above indenture, and acknowledged that they did sign, seal, and deliver the same as their free and voluntary act and deed for the purposes above mentioned.

And the said Ann M. Sims, wife of said John B., being by me examined separate and apart from, and without the hearing of her said husband, and the contents and purport of said indenture having been made known to her by me, declared, upon said examination, that she did voluntarily, and of her own free will and accord, and as her act and deed, sign, seal, and deliver the said indenture or conveyance without any coercion or compulsion from her said husband.

In testimony whereof I have hereunto set my name and affixed my seal the day and year last above written.

[SEAL.] SAM'L E. WILLIAMS,
Justice of the Peace.

The above mentioned Ann M. Sims, before the delivery of the above deed, and before the payment of the above money or any part
188 thereof, voluntarily, as an inducement to the said Everhart to consummate the bargain, accept the deed, &c., states and declares that she was twenty-one years of age on the twenty-fifth day of September, A. D. 1846.

ANN M. SIMS.

Signed May 28th, 1848, in presence of—
SAM'L E. WILLIAMS.

Depositions of George Colwell, Jesse H. G. Coplin, S. E. Williams, James Jack.

GEORGE COLWELL, of lawful age, being first duly sworn, deposes and says as follows:

Interrogated first by W. H. CALKINS, attorney for defendants:

Int. 1. State your name, age, place of residence, and occupation.

Ans. My name is George Colwell; aged fifty-three or four the twenty-second day of last February, as nearly as I can tell, the records having been burned up; Kankakee Township, Laporte County; farmer.

Int. 2. Are you acquainted with the parties, plaintiff and defendant, in this action?

Ans. I am some acquainted with the plaintiff, years ago. I am acquainted with the defendant, William Everhart.

189 Int. 3. When did you first become acquainted with the plaintiff? What year and what time in the year?

Ans. I became acquainted with the plaintiff in the fall of 1832.

Int. 4. Under what circumstances did you first become acquainted with her?

Ans. By the intimacy of her father's family and ours; they were intimate friends, and visited back and forth.

Int. 5. In what county and State was such acquaintance first made?

Ans. La Porte County, Indiana.

Int. 6. What part of La Porte County, and how thickly settled was the county at that time?

Ans. We were in the east part of the county; it was not very thickly settled at that time.

Int. 7. Please describe the plaintiff's appearance as to age when you first knew her. Describe her size.

Ans. She was a common little school girl, about ten or eleven years old—somewhere about there I should think. She was a good sized girl at that age—large enough to go two or three miles to school alone.

190 Int. 8. How far did you live from where the plaintiff lived at the time you first knew her, and how long did you and said plaintiff live in said neighborhood?

Ans. We lived about a mile apart. We lived pretty much in the same neighborhood from 1832 to 1845; we were intimate friends; we were together a great deal during the time, the same as young folks usually are.

Int. 9. Were you acquainted with her parents, and how intimately did you know them during said time?

Ans. I was acquainted with her parents; we were as intimate as neighbors could be—visited back and forth—visited one another.

Int. 10. Was there anything particular between your father's family and the family of the plaintiff that made them more intimate than they otherwise probably would have been?

Ans. Well, I expect there was; I know there was.

Int. 11. Please state what it was.

Ans. By them both believing one doctrine—both being Universalists. They took pleasure in meeting together and talking.

191 Int. 12. From the year 1832 to 1845 with whom did the plaintiff reside and with whom did you reside?

Ans. She resided with her father, Hugh Graham; her mother died during the time; I can't tell the year. I made it my home at my father's house. I made my living by working by the year and by the month.

Int. 13. Did you, during the time you lived in the neighborhood with the plaintiff, ever hear her father or either of them say anything about the plaintiff's age? If so, please state what was said in relation thereto.

Ans. Yes, sir, I did; they generally styled her one or two years younger than I was.

Int. 14. State when said plaintiff was married, and to whom.

Ans. In the year 1845—somewhere about that time—to John Sims.

Int. 15. How long before her marriage had she been keeping company with said Sims, if you know?

Ans. Somewhere about six months—about that time.

Int. 16. State whether the plaintiff had received the attentions of any other young men besides Sims; and, if so, state as near as you

192 can the year she first began to receive attentions of that kind.

Ans. Yes; she had other young men around occasionally, along—as near as I can recollect she was somewhere along about sixteen; I cannot recollect except by her age.

Int. 17. Can you tell what year it was that she began to receive the attentions of the young men? Give the year if you can; if not, as near as you can.

Ans. Well, somewhere about 1836. It has been a good while ago to remember the time.

Int. 18. After the plaintiff married Sims, about how long did she reside in this county?

Ans. Well, I can't tell exactly.

Int. 19. If she left this county where did she go, if you know?

Ans. I don't know; I lost track of her.

Cross-examined by W. B. BIDDLE, plaintiff's attorney:

Int. 1. How do you know in what year you first knew the plaintiff?

Ans. From the year we moved to La Porte County, the fall of 1832.

Int. 2. How are you able to fix the time of the marriage of the plaintiff?

193 Ans. Well, from some elections that were held.

Int. 3. What elections?

Ans. It was the time of John Clarkson serving for sheriff.

Int. 4. How are you able to connect the two events of the said service as sheriff and said marriage?

Ans. I was living at Stoner's and he sold a piece of land belonging to Sissony; he came there and sold it, one-half to Stoner and the other half to Bennetts; few days before that I was at her wedding—Clarkson and I were both there.

Int. 5. How long did said Clarkson serve as sheriff?

Ans. I believe, as near as I can recollect, he served one term; I can't say he served any longer—he might; I don't recollect.

Int. 6. At what time did the plaintiff go to school, as referred to in your answer to the 7th interrogatory-in-chief?

Ans. I don't know as she went to school at all. She was large enough if she had been sent. I don't know that there was a school-house in the county at that time.

Int. 7. State which one of the plaintiff's parents said she was

194 a little younger than yourself; and state fully all that was said on that subject and the circumstances that enable you to remember said statement.

Ans. Her father and mother; by us children playing together, and the circumstance of her and I being within a couple years of the same age, and the old folks took delight in comparing us to each other.

Int. 8. In making said comparison, what did they say?

Ans. Well, they said we would suit, being about one age or near together, and our actions so much alike.

Int. 9. In answer to twelfth interrogatory-in-chief, you state that you made your living by working by the year and month at the time referred to. Will you now state where you worked?

Ans. I worked 18 months for Mr. Chapam, within about 5 or 6 miles of Mr. Graham's. I worked two years for old Mr. Stoner, about the same distance, or a mile or two further. I don't know as I can recollect every man I did a day's work for. I made *it* my home with my

195 father, and during all the time did not live further than 5 or 6 or 8 miles from Mr. Graham's.

Int. 10. At how many different places during the time you say you were acquainted with the plaintiff did your father reside?

Ans. At about three places.

Int. 11. State, as nearly as you can recollect, when the mother of the plaintiff died.

Ans. Well, as near as I can recollect, she must have died about 1840. I cannot recollect the year. She must have died about that time.

Int. 12. State whether you have resided in La Porte County from the time you refer to in your deposition until the present?

Ans. I have resided here all the time.

Int. 13. Have you seen the plaintiff since her marriage with John Sims, and if you have, when and how often?

Ans. I don't recollect seeing her more than twice or three times since her marriage with John Sims, which was shortly after their marriage.

his
GEORGE + COLWELL.
mark.

JESSE H. G. COPLIN, of lawful age, first being duly sworn, deposes and says, as follows:

196 Int. 1. What is your name, age, occupation, and where do you reside?

Ans. My name is Jesse H. G. Coplin; age 53, last October; am a farmer; reside in La Porte County, State of Indiana.

Int. 2. How long have you resided in La Porte County?

Ans. Since March 28th, 1836.

Int. 3. Was you acquainted with Ann Maria Sims and her father? What was her father's name, and where did they reside at the time you knew them?

Ans. I was acquainted with Ann Maria Sims and her father. Her father's name was Hugh Graham. They resided in La Porte County, Indiana, in Pleasant Township.

Int. 4. Did you at any time work for said Hugh Graham, and did you live in his family? If so, state what work you did and when it was.

Ans. I worked for Mr. Graham, I think, in the year 1837; cut cord-wood. I lived in his family a part of the time. I cut one hundred cords of beach and maple wood that winter for him.

Int. 5. State if you knew at that time what was the age of
197 Ann Maria, from her appearance and her reputation in the family, or the statements of herself or her father?

Ans. Well, I should think from her appearance she was thirteen or fourteen years old; I heard her father often state that there was some two years' difference in our ages from what we talked. I represented myself to be sixteen years old when I came to the country.

Int. 6. State whether at the time you was there she received the attentions of young men or went into society as a young lady, and all you know on that subject?

Ans. Well I don't think I could say that any young men were paying attention, except her going to little dances and frolics.

Int. 7. State, if you know, when she was married, and who she was married to, and where she has lived since that time.

Ans. I think she was married in the year 1844, if my recollection serves me right; she was married to one John Sims, and she has
198 lived, I think, three or four years on a farm her father gave her in Laporte County; they sold the farm and lived in the town Laporte I think probably three years; they moved from Laporte to Chicago; they have lived there ever since so far as I have any knowledge.

Cross-examined by W. B. BIDDLE, plaintiff's attorney:

Int. 1. Did you work at Hugh Graham's at any other time than the winter of 1837?

Ans. I did, I think it was in 1842; when his wife died I was working there; I worked there off and on from 1837 to 1846.

Int. 2. State how continuously you worked and at how many different times and at what intervals?

Ans. I would sometimes work a week, sometimes longer, sometimes a few days. After I cut the wood for him I don't think I worked longer than ten or fifteen days at a time by the day; I worked in harvest, threshing and husking corn.

Int. 3. Has there been any circumstance or occur'ence which enables you to recollect said conversations with said Hugh Graham as to the plaintiffs' age? And if so, state what it is.

199 Ans. Well, nothing more particularly than that her youngest brother was bound to me when I got married and we talked about the ages of the family.

Int. 4. What other children had Hugh Graham living at home during your acquaintance with the family?

Ans. He had a daughter named Roxy, who died; the next was two sons, Elias and Arthur, and next was this Mrs. Sims, and next Josiah and a daughter by the name of Susan, and William; there were two others, who died when they were quite young. I think Mrs. Sims comes in between Elias and Arthur.

Int. 5. What did Hugh Graham say about the ages of his other children besides the plaintiff?

Ans. I don't recollect that he said anything specially about their ages.

Int. 6. Has any circumstance occurred to call to your mind what Hugh Graham said to you about the age of the plaintiff since your acquaintance with her ceased until the present time? And if there is any, state what it is, and when it occurred.

200 Ans. No circumstance until the asking of these questions.

JESSE H. G. COPLIN.

SAMUEL E. WILLIAMS, of lawful age, being duly sworn, on oath deposes and says as follows:

Examined by W. H. CALKINS:

Int. 1. State your name, age, place of residence, and occupation?

Ans. My name is Samuel E. Williams; aged fifty-five years; reside at Laporte, Indiana; occupation, lawyer.

Int. 2. Look upon the paper now shown you, a copy of which is as follows, to wit: "The above-mentioned Ann M. Sims, before the delivery of the above deed and before the payment of the above money, or any part thereof, voluntarily, as an inducement to the said Everhart to consum'ate the bargain, accept the deed, &c., states and declares that she was twenty-one years of age on the 25th day of September, A. D. 1846," signed "Ann M. Sims," "signed May 28th, 1847, in the presence of Sam'l E. Williams," and say whether it was executed in your presence and whether you signed your name thereto as a witness?

201 Ans. I have looked upon the paper writing of which the above question contains a copy, and find my name subscribed thereto as a witness, which name is in my own handwriting. I also see the name of Ann M. Sims signed thereto. I believe she signed it in my presence, because I see my name thereto, and the paper states that it was signed in my presence, though I have no present recollection of it, and I would not have signed it as a witness if she had not signed it in my presence or admitted it to be her signature. I have always been very particular about witnessing the execution of any paper unless the parties signed it in my presence or admitted it to be their signature.

Int. 3. To what paper writing, if any, is the above writing alluded to attached?

Ans. It is written on the blank part of a deed purporting to be a deed by John B. Sims and Ann M. Sims, his wife, bearing date 28th day of May, 1847, to Magdaline Everhart, conveying the east half of the south-
west quarter of section number thirty-four, in township No. thirty-
202 seven north, of range No. two west, in Laporte County, Indiana, purporting to have been acknowledged by John B. Sims and Ann M. Sims, his wife, on the 28th day of May, 1847, before Samuel E. Williams, justice of the peace, who is the witness now testifying.

SAMUEL E. WILLIAMS.

Plaintiff declines to cross-examine, because the name of the witness is not mentioned in the notice.

M. NYE, *Notary Public.*

JAMES JACK, of lawful age, being duly sworn, testifies as follows:

Interrogated first by W. H. CALKINS, defendants' attorney:

Int. 1. State your name, age, place of residence, and occupation.

Ans. My name is James Jack; aged sixty-six years; reside in Laporte County, and am by occupation farmer.

Int. 2. How long have you resided in Laporte County?

Ans. I have resided in Laporte County since March, 1839.

Int. 3. Were you acquainted with Ann Maria Sims and her father; what was her father's name; where did they live, and how near did you live to them?

203 Ans. I was acquainted with Ann Maria Sims in 1842, and her father, Hugh Graham; they lived in Pleasant Township, La Porte County; I lived about 4 or 5 miles from them.

Int. 4. Were you frequently at their house, and acquainted in the family?

Ans. Yes, sir; I boarded there in 1842 when I did a job of plowing, and also boarded there in 1843.

Int. 5. State if you know, from the appearance of the plaintiff, or from any statements made by her, her father or mother, herself or others in the family, what her age was at that time.

Ans. Well, we were talking about their ages when I was there, and she was next to the oldest in the family, and Elias told me, to the best of my recollection, that he was twenty years of age, or about twenty, and that he would soon be doing for himself. I should have taken her to have been—she was a well grown and well developed girl—not less than about seventeen years of age; from her appearance should have taken her to be from seventeen to eighteen years of age; I heard
204 her speak about being out to work for different persons where she had worked and their mode of living, and such like, when I was there.

Cross-examined by W. B. BIDDLE, plaintiff's attorney:

Int. 1. During how long a time were you acquainted with the family of said Hugh Graham, and the plaintiff particularly?

Ans. I knew from June, 1842, till they left the country; she was in the country until they sold that farm.

Int. 2. Did you frequently see her during several years commencing with the year 1842?

Ans. Yes, sir.

JAMES JACK.

EXHIBIT E.

In the U. S. circuit court, Indiana.

ANNA MARIA SIMS
vs.
WILLIAM EVERHART AND OTHERS.

It is agreed that the mortgage in the deed of conveyance from Hugh Graham to Ann M. Sims mentioned, of date 3rd April, 1845, and the mortgage mentioned in the deed of conveyance from said Ann M. Sims and her husband to Magdaline Everhart of date 29th May, 1847,
205 are the same. And that said Magdaline Everhart on the 4th day of September, 1847, paid off the said mortgage in full, together with the interest due thereon, as mentioned in said last mentioned deed. And that the said mortgage has never been cancelled of record in said county of Laporte.

Nov. 5th, 1873.

WEIR AND BIDDLE,
Attorneys for Plaintiff.

EXHIBIT F.

No. .] TREASURER'S OFFICE, *La Porte, Ind., Nov. 5*, 1873.

Received of Magdaline Everhart dollars and cents, in full of State, county, and township tax for the year , on poll, $; personal property, ; dog, . Also the following real estate:

		Personal property and poll.	Sec.	Town.	Range.	Acres.	H'ds.	Doll's.	C'ts.
1847. 7	185	E. ½ S. W. ¼	34	37	2	80		3	35
1848. 8	69	E. ½ S. W. ¼	"	"	"	"		5	25
1849 "	70	" " " " ¼	"	"	"	"		5	77
1850	85	" " " "	"	"	"	"		5	14
1851	89	" " " "	"	"	"	"		12	08
1852	86	" " " "	"	"	"	"		14	00
1853	91	" " " "	"	"	"	"		14	72
1854	83	" " " "	"	"	"	"		11	20
206 1855	79	E. ½ S. W. ¼ ..... died	34	37	2	80		12	72
1856	88	" " " " $14.72 penalty, & int. $1. 65.	"	"	"	"		16	37
1857	113	" " " "	34	"	"	"		12	64
1858	104	" " " "	"	"	"	"		11	52
1859	113	" " " "	"	"	"	"	$18. 00	18	00
1860	123	" " " "	"	"	"	"		17	28
1861	124	" " " "	"	"	"	"		16	56
1862	125	" " " "	"	"	"	"		16	80
		In the name of C. B. Blair, paid by Mrs. Everhart:							
1863	37	" " " "	"	"	"	"		21	60
1864	126	" " " "	"	"	"	"		26	75
1865	128	" " " "	"	"	"	"		32	25
1866	128	" " " "	"	"	"	"		27	75
1867	130	" " " "	"	"	"	"		27	25
1868	120	" " " "	"	"	"	"		36	50
1869	110	" " " "	"	"	"	"		44	70
1870	111	" " " "	"	"	"	"		38	77
1871	112	" " " "	"	"	"	"		38	78
1872	113	" " " "	"	"	"	"		35	88
								523	63

LA PORTE, *Nov. 5th*, 1873.

I, Mark Allen, treas. of La Porte County, certify that the above is a correct statement of taxes paid by Mrs. Magdalen Everhart, for the years 1847 to 1873, inclusive, on the E. ½ S. W. ¼ sec. 34, township 37, range 2.

MARK ALLEN,
County Treasurer.

207 In the United States circuit court, Indianapolis, Indiana.

SIMS
vs.
EVERHART & OTHERS.

We agree that the within statement may be introduced in evidence as proof of the amount of taxes paid by said defendant' and their testatrix on the said land in controversy for the years 1847 to 1873, inclusive, without objection.

Nov. 5, 1873.

WEIR AND BIDDLE,
Att'ys for Pl'ff.

EXHIBIT G.

In the U. S. circuit court.

ANNA MARIA SIMS
vs.
WILLIAM EVERHART ET AL.

It is admitted by and between the parties to this suit:

First. That the following precipe was indorsed in the original complaint in this cause filed in the La Porte circuit court on the 10th day of February, 1872, to wit:

The clerk will please issue summons on the within complaint, returnable according to law.

(Signed) WEIR AND BIDDLE,
For Plaintiff.

Second. That Magdaline Everhart died on the day of October, 1871.

Third. That the last will of Magdalena Everhart was admitted
208 to probate on the 13th day of November, 1871, and letters testamentary were issued thereon to the defendants, William Everhart and Elizabeth E. Burson, before and by the clerk of the La Porte court of common pleas on the 20th day of November, 1871.

Fourth. That the land in controversy is worth six thousand dollars.

And it is agreed that the facts above set forth shall be considered as properly and fully proven upon the hearing before the master commissioner to whom this matter is referred and for all purposes of this suit.

WEIR AND BIDDLE,
Solicitors for Complainant.
W. H. CALKINS,
For Def't.

Depositions of Geo. Dorland, D. L. Brown, J. E. Darlington.

GEORGE C. DORLAND, of lawful age, being first duly sworn, deposes and says as follows:

Interrogated first by defendants' counsel.

Int. 1. State your name, age, residence, and present occupation.

Ans. George C. Dorland; age, twenty-eight years; La Porte,
209 Indiana, is my residence, and occupation is deputy recorder of La Porte County, Indiana.

Int. 2. Are you acquainted with the plaintiff, or either of the defendants; if so, how long?

Ans. Am not acquainted with the plaintiff, but am acquainted with William Everhart and Mrs. Burson; not acquainted with Margaret Darlington; have known them for seven or eight years.

Int. 3. State if you are familiar with the records of the recorder's office of said county, and how long you have been familiar with them, and in what capacity.

Ans. I am familiar with the records, about seven or eight years, as a deputy recorder.

Int. 4. Please state if you have made any examination of the records of said office with reference to any mortgage made by Hugh Graham to the State of Indiana, and if you find any such mortgage made by him, recorded in the recorder's office, on the east half of the southwest quarter of section thirty-four, township thirty-seven north, range
210 two west, situate in La Porte County. Please attach a copy thereof hereto as a part of your answer to the interrogatory.

Ans. I have made an examination, and find said mortgage to be recorded in deed-record "G" on page "310" of the records of said county, and do hereby attach a copy thereof, marked Exhibit A, the said copy is my handwriting, copied by me, and is a true copy.

GEORGE C. DORLAND.

Know all men by these presents that I, Hugh Graham, of the county of La Porte, in the State of Indiana, for and in consideration of the sum of four hundred dollars of the surplus revenue money of the United States deposited with the State of Indiana, to me in hand paid by John Brown, agent of said State of Indiana, for that part of said revenue to which said county is entitled by virtue of an act of the general assembly approved February, 1837, have granted, bargained, and sold, and do, by these presents, grant, bargain, sell and convey unto the said State of Indiana all that tract or parcel of land, situate
211 in said county of La Porte, and known and designated as the east half of the southwest quarter of section thirty-four (34), township number thirty-seven (37) north, range two (2) west, containing eighty (80) acres.

To have and to hold the said bargained premises so bargained and sold as aforesaid to the use and behoof of the said State of Indiana forever; and I, the said Hugh Graham, do hereby convenant with the said State of Indiana, that I am lawfully seized in fee of the aforesaid premises, and have good right and authority to sell and convey the same as aforesaid, and that I will forever warrant and defend the same to the said State of Indiana from the claim or claims of all persons whomsoever. Conditional, nevertheless, that if I, the said Hugh Graham, shall well and truly pay or cause to be paid to the said State of Indiana the sum of four hundred dollars, according to the conditions, true interest

and meaning of a bond by me executed to the said State of Indiana, bearing even date herewith, for the aforesaid sum of four hundred
212 dollars, then this mortgage to be discharged; otherwise to be and remain in full power.

In witness whereof we, the said Hugh Graham and Susanna Graham, wife of said Hugh Graham, who hereby relinquish her right of dower to the above-mentioned premises, hereunto set our hands and seals this thirteenth day of April, in the year of our Lord one thousand eight hundred and thirty-eight.

HUGH GRAHAM. [SEAL.]
SUSANNA GRAHAM. [SEAL]

E. B. WOODSON.
B. F. BROWN.

STATE OF INDIANA,
La Porte County:

Before me, the undersigned, a justice of the peace in and for said county, personally came Hugh Graham, the above-named grantor, and acknowledged the above mortgage, and to be his act and deed for the uses and purposes therein named. Also personally appeared Susan Graham, wife of the said Hugh Graham, and being by me examined separate and apart from her said husband, acknowledged that she executed the above mortgage-deed of her own free will and accord,
213 and hereby relinquishes all her right and title to dower in the above-described premises without any coercion or compulsion of her said husband.

Given under my hand and seal this 26th day of May, 1838.
[SEAL.] E. B. WOODSON, *J. P.*

Recorded October 30th, 1838, in deed-record G, on page 310.

DANIEL L. BROWN, being duly sworn, testifies as follows:

Int. 1. State your name, age, residence, and what was your occupation on and before the 25th day of February, 1872.

Ans. My name is Daniel L. Brown; my age is twenty-seven years; my residence is La Porte, Indiana, and my occupation is sheriff of La Porte County, and has been for three years past, and was sheriff on and before said day.

Int. 2. State if you are acquainted with the plaintiff, or either of the defendants; if so, how long?

Ans. I am acquainted with William Everhart; have known him over ten years, and have known Mrs. Burson about seven years; known Mrs. Darlington about five years; am not acquainted with the other party.

214 Int. 3. You may look upon the paper now shown you, and state whether you ever seen it before; make a true copy of it a part of your answer, together with any endorsement made upon the back of it, made by you or any of your deputies, and then state as near as you can recollect the first time you saw the paper, and when it was.

Ans. I have looked upon the paper; the copy is as follows: "State of Indiana, to the sheriff of La Porte County: You are commanded to summons William Everhart and Elizabeth E. Burson, executors of the last will of Magdaline Everhart, Margaret Darlington, and James Everhart, to appear in the La Porte circuit court on the second day of the next term thereof, to answer to the complaint of Anna Maria Sims, and of this summons make due return.

"Witness the clerk and the seal of the court this 10th day of February, 1872.

"[L. S.] JAMES H. SHANNON, *Clerk*,
B. H. C. SHANNON, *Deputy*."

The endorsement on the back is as follows, made by my deputy, D. A. Bridges:

Served the within summons February 25th, 1872, by reading
215 the same to William Everhart, and March 6th, 1872, by reading the same to Elizabeth E. Burson, executors of the last will of Magdaline Everhart, and also March 22nd, 1872, by reading said summons to Margaret Darlington. And I have made diligent search, and cannot find the within-named James Everhart in my bailwick.

D. L. BROWN, *S. L. C.*
B. D. A. BRIDGES, *Deputy*.

It was during the term of the court of common pleas of La Porte County, February term, 1872.

Int. 4. Where was the paper when you first seen it, and where did it remain for some time after you seen it. State fully.

Ans. The first I saw of it was on the clerk's desk in the clerk's office; it was put by the clerk into a drawer above his desk; the next time I saw it was after the term of common pleas court adjourned, in the drawer before stated.

Int. 5. You may now state when said summons was taken by you from said drawer, with reference to the date of the service of said
216 summons on said Everhart, as appears on the back thereof; state as near as you can recollect.

Ans. My best recollection is that I brought my "sheriff's box" that I have to receive papers in the clerk's office, from the court-house into the clerk's office, and was arranging my papers, and went to the drawer first referred to and took the papers out that had been put there during said term of court by the clerk, and in looking them over I saw the summons above referred to, and about that time saw Mr. Everhart out on the sidewalk. I went out with a bundle of papers in my hand, called Mr. Everhart, and when I called him he was crossing the street in front of the court-house; he stopped and I served the summons on him.

Int. 6. How long was it, according to your best recollection, after taking the paper from the drawer above referred to, that you served the summons upon said Everhart?

Ans. It was the day I took it from my box.

Int. 7. If you served the summons on said Everhart, please ex-
217 plain how it happens that D. A. Bridges, as your deputy, appears to have made the service, as shown by the return.

Ans. I had been in the habit of having Mr. Bridges make most of the returns on summons; on most all occasions where he had finished the serving of *of* the summons; that is, where I had served part myself and told him to finish and make the return, having given him the information of the date of my serving.

Cross-examined:

Int. 1. In your answer to interrogatory fifth of your examination-in-chief, you say that you went to the drawer first referred to, meaning, as I understand you, to the drawer in your answer to interrogatory fourth; you will please now explain what drawer you had reference to.

Ans. It was a drawer above the clerk's desk or table wherein was put papers during the session of court that were being issued for the next term of court, the "sheriff's box" being kept in the court-house during court. Papers I refer to were summons, attachments, writs of executions and such kind of papers to be served at the next term
218 of court, the regular box being kept in the court-house during court for the reception of papers that needed immediate attention, such as subpœnas.

Int. 2. Is it the uniform practice of the clerk of this county to deposit all summons and other papers requiring service by the sheriff in the drawer referred to or in the box that you call the "sheriff's box," and is it also the uniform practice of the sheriff to receive or take said papers from said box or drawer to be served?

Ans. It is the uniform practice of the clerk to place all papers for service in a tin box marked "sheriff's box" on the outside, which hangs, except during the session of court, at the right of the clerk's desk in the clerk's office. The drawer above referred to is a private one used by myself for such papers as are attended to by myself alone, and is also used for private letters and such business as is generally attended to by the sheriff himself; except during court such papers as do not require immediate attention are placed there by the clerk and are
219 afterwards taken out by me and put in the "sheriff's box."

Int. 3. For whom are summonses and other papers not requiring service during the term of court then pending placed in said drawer by the clerk?

Ans. For the sheriff.

Int. 4. Is the drawer referred to known and designated in the clerk's office as the sheriff's drawer?

Ans. It was generally understood at that time between the clerk and myself that the drawer above referred to was for my private use.

Int. 5. Was it also understood between you and the clerk at the time referred to that summonses issued in the office of the clerk when your box was in the court room should be deposited in said drawer?

Ans. It was for papers that did not require my attention at that time.

Int. 6. State whether the date of service of said summons on defendant, William Everhart, is correctly given in the return thereon; and, if not, state the correct date.

Ans. It is not, to the best of my recollection, and I think I am
220 correct from other circumstances connected therewith, that it should have been return as served on William Everhart "on the 24th of February, 1872," instead "on the 25th of February, 1872," as the 25th was on Sunday, and it was not served on that day. My best recollection is it was on Saturday.

Re-examined:

Int. 1. You may state the reason why the private drawer was kept by you in the clerk's office.

Ans. It was kept there for private letters that came to me in my absence and for private correspondence connected with the detective agency. I also kept my bank book and checks in it.

Int. 2. Did you, in February, 1872, before and after that time, have an office, and was that separate and distinct from the clerk's office?

Ans. I did; my office was in a room in the court-house, the clerk's office being in a building occupied by the clerk and recorder.

Recross-examined:

Int. 1. Is it the usage of the clerk to deliver summons and papers requiring service by the sheriff to you in that separate office of yours?

Ans. It is not.

DANIEL L. BROWN.

221 JOHN E. DARLINGTON, being duly sworn, testifies as follows:

Int. 1. State your name, age, residence, and occupation.

Ans. My name is J. E. Darlington; I am thirty-six years old; my residence is La Porte County, Indiana; my occupation is that of a farmer.

Int. 2. State whether you are acquainted with the plaintiff or either of the defendants; if so, how long?

Ans. I can't say that I am acquainted with the plaintiff; I have seen her husband. Am acquainted with the defendants; have always known them. Margaret Darlington is my mother, William Everhart is my uncle, and Mrs. Burson is my aunt.

Int. 3. Are you acquainted with the east half of the southwest quarter of section thirty-four, township thirty-seven north, of range two west; if so, how long have you known it?

Ans. I am. About twenty-five years, as near as I can recollect.

Int. 4. Are you acquainted with the improvements that have been put thereon since its occupancy by Magdaline Everhart and those
222 holding under her? If so, state in detail the improvements and the value thereof severally.

Ans. I am acquainted with them. When we first came there it was a common frame house about twenty-five feet one way and between thirty to thirty-five feet another; one-half of it was one story high and the other one and a half story high; the house was partly lathed and not plastered; there was no foundation, except the blocks under the house, upon which it rested. Since that time, and since it has been occupied by Mrs. Everhart, an addition has been built to it, about twelve by twenty-five feet; the main building has been raised to a story and a half high, lathed and plastered all through, with brick foundation put under the main building; a cellar has also been put under it, about 16 feet square, or sixteen by eighteen feet, and the cellar has a brick floor in it; the foundation and cellar could not have been put there for less than one hundred and fifty dollars; the carpenter work done and lumber is also worth one hundred and fifty dollars; there are eight rooms, and the lathing and plastering must have cost about ten dollars a
223 room; one chimney was built, which cost about six dollars; a well has been dug 44 feet deep; digging and walling it cost about seventy-five cents a foot; the brick in the well are worth about thirty dollars; a smoke-house and other outbuildings were built, costing about one hundred dollars; a barn was built, costing between four and five hundred dollars, if repaired a little will be as good as new; there is about 7 to 8,000 feet of lumber in the fence, and between 350 to 375 fence-posts, which cost from two hundred to two hundred and twenty-five dollars; there has been about five thousand rails been put on it; the rails cost sixty dollars a thousand; the improving and breaking of the land worth about ten dollars an acre, but it has added more to the value of the land; the old orchard was of no account, in which all the old trees had to be grafted and new trees set out, and is now worth about one hundred dollars more; the fence around the garden and yard has cost twenty-five dollars.

Int. 5 Have these improvements that you have estimated been put on the place since the year 1847; and if so, by whom?

224 Ans. Yes; they were put on since 1847. It was done at Mrs. Everhart's request, and labor was partly done by my father, brothers, and myself.

Cross-examination:

Int. 1. State what portion of said land was enclosed when Magdaline Everhart took possession of it?

Ans. There was sixty acres I am certain was enclosed, the whole of it I could not say.

Int. 2. How much of it had been broke?

Ans. I am not quite positive about that; somewhere in the neighborhood of sixty acres.

Int. 3. How long had Sims possession of the land?

Ans. I cannot tell; I know he had possession when we cut the wheat.

Int. 4. Who made the improvements that were on the land when Magdaline Everhart came into possession of it, including the house, fencing, and breaking, and when were said improvements made?

Ans. I can't tell who made the improvements; I was only acquainted with the land a year before Mrs. Everhart moved on, and during

225 that time there was no improvement made by either.

Int. 5. Into how many fields was the portion of said land which was inclosed, divided at the time Mrs. Everhart took possession of it?

Ans. It was all inclosed into one field, no division fences, only the outside fences.

Int. 6. When was the board-fence built that you speak of?

Ans. It has not been six years since the last was built; about sixteen years ago we commenced building board fences.

Int. 7. When was the first board fence built, and how much was there of it?

Ans. It was built on the south line of the place along the road between sixty to eighty rods; do not recollect whether it was built clear through.

Int. 8. What is the condition of the fence at present?

Ans. It is good, with the exception of one or two places. It will turn stock very well, about four or five posts and about as many boards will make a substantial fence at present.

Int. 9. What is the difficulty with the four or five posts that need to be replaced?

226 Ans. They are posts that are partially rotten, and such as where stock has run against and broken loose.

Int. 10. What is the matter with the boards?

Ans. They are boards that horses and stock have broken.

Int. 11. Were such boards rotten, or partially so?

Ans. Not that I noticed.

Int. 12. Was there a rail fence where the board fence was built; and if so, what was done with the rails when the board fence was built?

Ans. There was a rail fence, but it was mostly decayed; some good rails were taken and put in fence again.

Int. 13. Where was the next board fence built, and when was it done?

Ans. It was built around the barn yard; it was built some six or seven years ago.

Int. 14. How large is that inclosure about the barn?

Ans. It is from six to ten rods each way.

Int. 15. Was there a rail fence there before that was made?

Ans. There was not.

227 Int. 16. Was there no inclosure about the barn at that time; if there was, what was it?

Ans. We had the barn yard inclosed with rails. I make this correction. I misunderstood the other question.

Int. 17. Was there any other board fence built after that was built about the barn yard; and, if yea, when, where, and how much?

Ans. There was a fence built inclosing the orchard and some other ground; it was done soon after the barn-yard fence was built; between seventy-five to one hundred rods of it.

Int. 18. How much ground is there in that inclosure about the orchard?

Ans. I suppose between three and four acres.

Int. 19. When was the barn built on that place?

Ans. I can't recollect exactly. I suppose from three to five years.

Int. 20. What was the size of it?

Ans. It is thirty feet by forty feet.

Int. 21. Are you acquainted with the value of buildings?

Ans. Not to any great extent. I am some acquainted.

228 Int. 22. Do you know what amount of material would be necessary to construct such a barn as the one in question, and are you acquainted with the value of such materials and with the amount of work that would be required thereon and its value?

Ans. I can tell by making an estimate of the amount and am acquainted with the value of the materials. I don't think I can tell the number of days' work that it would take. I suppose I am acquainted with the value of it.

Int. 23. State whether you have been engaged in the business of building barns or other buildings?

Ans. I have never made a business of it, but have had some built and have helped build some.

Int. 24. What out-buildings are there that you value at one hundred dollars?

Ans. A privy and a smokehouse; there is a kind of a hen-house on it, but that don't amount to much.

Int. 25. Describe the general character of the barn and smoke-house as to the materials used and the manner of their construction?

229 Ans. The smoke-house is ten by twelve, is made out of poplar and oak studding, painted, and a good smoke-house; has a shingled roof. The barn is sided up with pine, planed, cracks are battaned, doors matched, shingled with pine shingles, with a projecting cornice of sixteen inches, double floors, planed and matched; to the grainery two hay-lofts; the posts are from sixteen to eighteen feet.

Int. 26. Into how many fields and lots is that land now divided, and what is the size of each?

Ans. There is one field of fifty-five acres, one of about fifteen acres, a lot of about one acre, used for pasture lot, the orchard, and barn-yard and other yard.

Int. 27. What use was made of the five thousand rails that you have mentioned?

Ans. They were used on the place in repairing fences, cross-fences, and some were piled upon the place.

Int. 28. Where were the rails made?

Ans. I believe most of the rails were made in the vicinity of Fishlake and not on the farm.

J E. DARLINGTON.

The further taking of J. E. Darlington's deposition was ad-
230 journed to Nov. 4th, 1873, at 9 o'clock a. m.

Int. 29. In answer to the last question you say that most of the rails were made at Fish Lake; now please state where the balance were made.

Ans. Some were made at the place we are living on, near Bald Hill, and some were made on a piece of land that father bought of Blair and Rose, and I believe some were hauled from the Kankakee, but I am not positive about that.

Int. 30. Were any of them made on the land in controversy?

Ans. They were not.

Int. 31. Were any of the posts, used in the board fence, taken from said land?

Ans. They were not.

Int. 32. What proportion of the rails, about which you have testified, are piled up on said land?

Ans. I can't tell exactly; there is about enough rails for a fence sixty rods.

Int. 33. When were those five thousand rails made?

Ans. About that many rails have been made and put on the place within the last ten years; these five thousand rails spoken of were
231 handled by myself.

Int. 34. What did they cost?

Ans. They cost at time, part of them were delivered at five dollars a hundred, part were bought at three dollars per hundred in the woods, and we hauled those ourselves.

Re-examined:

Int. 1. You may state the condition of the old fence when Mr. Darlington first went upon the place; describe it particularly.

Ans. Well, it was principally built out of poles; some ash rails; in the spring when we went on the place we had to repair the fence considerable to save the crops, and also had to straighten it up; it was calculated to be from six to eight poles and rails high; the fence was about half gone, and was not a good fence in the first place.

Int. 2. Now state about the value of the cross fences and all other fences built upon the place where there were no fences when your father first moved there, exclusive of the outside fence.

232 Ans. That ain't very easy to come at; I can come somewhere near it. Well, it would cost as much as two hundred and fifty dollars; that is its value.

Int. 3. What is the value of the rails piled up on the place which were formerly in the fence on the place?

Ans. Well, I suppose now in their condition are worth from fifty to seventy-five dollars.

Int. 4. State the difference in value of the outside fence which incloses the land as it is now and as it was when your father first went upon the place; state as near as you can.

Ans. The fence is twice as good again now as it was then, and labor and material is twice as high now as it was then; we keep up about three hundred and thirty-five rods of outside fences, the balance of the fences are kept up by other parties as partition fences; the fences are worth from a dollar to a dollar and a half per rod.

Int. 5. You may state in what condition the barn now is, whether it has been lately repaired and to what extent.

233 Ans. It is in very good condition now, and has been repaired

to the extent of two hundred and fifty dollars' worth within four years.

Recross-examined:

Int. 1. State the height of the outside fence as it now is on the land and the number of rails high of the rail fence.

Ans. The fence is some part of it eight and some nine rails high, some of the board fences are six boards high and some are five boards high.

Int. 2. How many rods of fence can an ordinary hand build of rails on the ground such as the rail fence on the farm?

Ans. About twenty-five rods.

Int. 3. State what repairs were made on the barn about four years ago.

Ans. It was reroofed, new batting, sheating, and pine shingles; it was sided with pine sidings, planed, the cracks were battened, two new doors were made, matched; also a new floor in the stable, new
234 mangers and new stalls, about two years before the general repairs; at that time there was new sills and new sleepers, some new, not all; a new barn floor laid, the grainery floor.

J. E. DARLINGTON.

Deposition of Joseph B. Lewis.

JOSEPH B. LEWIS, produced by the defendant, being duly sworn in said cause, upon his oath deposes and says as follows, viz:

Interrogated first by defendant:

Int. 1. What is your name and age, and what is your occupation and where do you reside?

Ans. My name is Joseph B. Lewis; my age is 54 years; a farmer now, but a carpenter by trade; reside near Maysville, De Kalb County, Mo.

Int. 2. Are you acquainted with Anna Maria Sims, the plaintiff in this suit, and were you acquainted with her father? What was his name?

Ans. I am acquainted with Anna Maria Sims, the plaintiff in this suit, and was acquainted with her father. His name was Hugh Graham.

235 Int. 3. How long have you known them, and where did they reside when you knew them, and how long did they reside there; did you reside near them, and how near?

Ans. I have known them ever since the month of August, 1837. They then resided in Pleasant Township, La Porte County, Indiana, and continued to reside there until some time about the year 1845, about which time Hugh Graham left the country. I lived all this time within two miles of Hugh Graham's residence, and a portion of this time was a member of his family.

Int. 4. Did you do work for her father; if so, what work? State when it was; give the date particularly if you can.

Ans. I did work for her father, Hugh Graham. I worked on a barn as a carpenter. I commenced work about the middle of June, 1839, and continued to work there off and on until the first part of the following winter.

Int. 5. Did the said Anna Maria then reside in the family of her father? Were you well acquainted with her?

236 Ans. The plaintiff, Anna Maria Sims, resided in the family of her father during that entire time; and I was well acquainted with her.

Int. 6. Do you know what her age was at that time from her appearance or from reputation or from any statement in relation thereto in the family?

Ans. I do not know what her age was at the time I worked for her father in the year 1839. She was at that time to all appearance a fully developed woman, and had the appearance of being at least sixteen years old, and from the best of my recollection that was about her age, but whether I got it from the family or from impression I do not now recollect. She was then nearly as large as when I last saw her about the year 1846.

Int. 7. Did you about that time hear her father or mother or any member of her family make any statement in relation to her age? If yea, state what it was and every matter connected therewith.

237 Ans. Whether or not I heard her father or mother or any member of her family make any statements in relation to her age I do not now know.

Int. 8. Do you know of any other matter or thing occurring at the time that enables you to determine her age? If so, state it fully.

Ans. I do not know of anything else than what I have stated.

Int. 9. Did you hear the said Anna Maria say what her age was? If so, state what it was and what she said.

Ans. I do not recollect of hearing her state what her age was.

Int. 10. State every other matter or thing concerning her age within your knowledge. State it fully.

Ans. I know nothing further than stated.

JOSEPH B. LEWIS.

238 In the seventh judicial circuit, district of Indiana.

I, John D. Howland, clerk of the circuit court of the United States for the circuit and district aforesaid, do hereby certify that the foregoing is a full, true, and complete transcript of the record and testimony in the above entitled cause, as fully as the same remains of record and on file in my office.

In witness whereof I do hereto set my hand and the seal of said court, at Indianapolis, this 25 day of April, 1877.

[SEAL.] J. D. HOWLAND, *Clerk.*

(Indorsement on cover:) No. 271. Anna M. Sims, appellant, vs. William Everhardt and Elizabeth E. Burson, executors of Magdalena Everhardt, deceased, Margaret Darlington, and James Everhardt. Indiana C. C. U. S. Filed 11th October, 1877.

OFFICE SUPREME COURT U.S.
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1879.

ANNA M. SIMS,
Appellant,
vs.
WM. EVERHARDT AND ELIZABETH E. BURSON, EXECUTOR, AND EXECUTRIX, OF MAGDALENA EVERHARDT, DECEASED, MARGARET DARLINGTON AND JAMES EVERHARDT,
Appellees.

No. 271.
Appeal from the Circuit Court of the United States, for the District of Indiana.

BRIEF AND ARGUMENT FOR APPELLANT.

ARTHUR D. RICH,
Counsel for Appellant.

CHICAGO:
JAMESON & MORSE, PRINTERS.
1880.

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Appeal from the Circuit Court of the United States, for the District of Indiana.

STATEMENT OF THE CASE.

On the 10th day of February, 1872, the appellant filed her complaint in due form under the Indiana code of practice, against the appellees, in the Circuit Court of Laporte County, Indiana. Summons was duly issued and served, and the defendants brought into that court. The cause was afterwards transferred to the Circuit Court of the United States for the District of Indiana, and was docketed by the Clerk of the latter court as a cause in Chancery. On the 2d day of November, 1874, the original complaint was amended, or rather renewed, by putting it into the form of a bill of complaint in Chancery. (Printed Record, page 8.)

THE BILL OF COMPLAINT of Anna Maria Sims, a citizen of Illinois, complainant, against Wm. Everhardt, Elizabeth E. Burson and Margaret Darlington, citizens of Indiana, defendants,

alleges: that she now is and on and prior to the 28th day of May, 1847, was the owner in fee simple of the following described real estate, situate in Laporte County, Ind., to wit: The W. ½ of the S. W. ¼ of Section 34, Township 37 North, of Range 2 West, of the value of more than $5,000.

That on that day she was an infant under the age of twenty-one years, the wife of one John B. Sims, and continued uninterruptedly his wife from the day of their marriage, July 4th, 1844, until February 14th, 1870, when she was divorced from him on account of his misconduct; that on the 24th day of May, 1847, and for a long time prior thereto, and during her coverture and minority, her said husband persistently importuned her to sell said land, and upon her repeated refusal to comply with his wishes, he often used toward her abusive, violent and threatening language, often threatening to abandon her, and by reason of said threats she became intimidated, and feared that if she continued to refuse he would abandon her or inflict upon her some bodily injury; and she became weak and broken down in spirit and feared longer to refuse or to communicate to the officer before whom the deed thereof hereinafter mentioned, was acknowledged, the fact of the influence used to procure the execution thereof; that on the day last mentioned and at divers times previous thereto, the said Sims, and one Magdalena Everhardt, acting for herself and through her agents, fraudulently combined and confederated with each other, for the purpose of defrauding complainant out of her said land, the said Magdalena and her said agents, well knowing that complainant was then under age, and was acting under the restraint and coercion of her said husband. Further, that on said last mentioned day, in pursuance of the confederation between said Sims and said Magdalena, and by means of persuasion and deception used by her said agents and by means of the coercion and undue influence of said Sims, the appellant joined with her said husband in the execution of a writing which purports to be a deed conveying her said land to said Everhardt, a copy of which deed is attached as an exhibit; that under said pretended deed the said Magdalena Everhardt immediately thereafter took possession of said land, and continued in possession thereof, until 1871, when she died testate; that the said defendants William Everhardt,

Elizabeth Burson and Margaret Darlington, divisees or legatees, and the two first named executors, under the will of said Magdalena, thereupon took and have continued in possession of said land ever since, receiving the rents and profits thereof; that said Magdelena caused said pretended deed to be recorded in the County of Laporte, Ind., and she in her lifetime and the said defendants since her death, have asserted title to said land thereunder. Complainant further alleges that soon after the removal of her disability of coverture by said divorce, she demanded of said Magdalena, and since her death of her said executors the possession of said land, and gave notice of her purpose to hold said pretended deed void, and of her disaffirmance thereof, which possession the said Magdalena and her executors have at all times refused to yield up; and complainant further alleges that the said pretended deed is a cloud upon the title of her land; that at the time said Magdalena entered into possession thereof, there was a dwelling house, fences and other improvements thereon, and a large portion thereof was under cultivation, and that the rents and profits thereof she is informed and believes have been about $250 per year.

She admits that said Magdalena, at the time of the pretended execution of said deed, paid the consideration named therein, to her said husband, but she avers that he appropriated the same wholly to his own use; further, that the said Magdalena has paid and discharged the mortgage mentioned in said deed; and upon account being taken of the rents and profits, complainant offers to allow to said defendants the amount of said mortgage and interest thereon, and also, if it be held that she is in equity bound to refund the purchase money so received by her said husband, she offers to allow the same upon such account, and if the same exceed the amount of the rents and profits, she offers to pay such excess when ascertained.

Prayer for injunction and for an account of rents and profits, with offer to pay defendants any sum that may be found due them upon such account, and for other relief, &c.

THE ANSWER joint and several of the defendants, William Everhardt and Elizabeth E. Burson, as executors of the last will and testament of Magdalena Everhardt and as legatees thereun-

der, and of Margaret Darlington, to said bill of complaint admits that on and from May 28th, 1847, complainant was the owner of said land, but avers they have no knowledge, information or belief as to her infancy on that day except as informed by said bill, and require proof thereof; that all knowledge, information and belief on that subject at the date aforesaid was derived from a paper writing signed by complainant, alleging that before the delivery of said deed and before the payment of the money or any part thereof, voluntarily and as an inducement to the said Everhardt to consummate the bargain, accept the deed, etc.; she states and declares that she was 21 years of age on the 25th day of September, A. D., 1846; that at the time she was a fully developed married woman and reputed in the neighborhood as being 21 years of age; but that, as matter of great caution, Samuel Burson, who acted for said decedent Magdalena as her agent in the purchase of said land, caused said paper writing to be made and signed by complainant before he would accept the deed or pay over to her the consideration therefor, and then and there, believing said statement to be true, and having no knowledge, information or belief to the contrary, and relying thereon, he accepted said deed and paid the purchase money, which he would not have done except on the faith of said statement. They admit that at the time complainant was the wife of one John B. Sims, and aver that they have no knowledge, information or belief as to whether she was divorced from him Feb. 14th, 1870, except from said bill, and require proof thereof. As to the alleged importunities of her said husband to sell said land and as to his alleged threats and abuse of complainant and her weakness and broken spirit, they deny any knowledge, information or belief except from said bill, and require proof. As to the alleged combination and confederation between complainant's said husband and said Magdalena and her agents for the purpose of defrauding complainant, the alleged restraint and coercion of her said husband and the solicitation and persuasion of said Magdalena to induce complainant to sell and convey said land, defendants severally deny to be true, and deny any knowledge, information or belief concerning the same except from said bill, and on the contrary aver that so far as is known to said Magdalena, the complainant acted freely and vol-

untarily, and manifested more anxiety to sell than did her husband, and they require proof of each and every such allegation. They aver that said decedent or her agents never in any manner misled complainant or made any statements relating to said purchase tending to mislead. They admit the execution, acknowledgement and delivery of the deed referred to in said bill, but deny it was executed, acknowledged or delivered under any restraint, coercion or deception from said decedent or her agents, and have no knowledge, information or belief concerning the acts alleged to have occurred between complainant and her said husband, and deny the same, and require proof thereof. They admit that said Magdalena caused said deed to be duly recorded in said county, and claimed title to said lands from the date thereof to the date of her death, and during such time was in possession, free from adverse claim, and that since her death these defendants have continued in possession, claiming under her.

They deny that complainant in any proper or sufficient manner ever gave notice of her disaffirmance of said deed or of her purpose to hold it void to said decedent in her lifetime or these defendants since her death. They admit a pretended notice was said to be given by one Flagg, an attorney at law, verbally to said Magdalena, the said Flagg acting as complainant's attorney in prosecuting an action against these defendants for the recovery of said land in the Laporte Circuit Court, Indiana, which action was afterwards abandoned for the want of prosecution. They aver that such a demand was informal, illegal and of no effect because no entry was made upon said land at this time and no sufficient words of disaffirmance were used.

They further say that more than twenty-three years had elapsed before the commencement of said action and before demand had been made or notice of disffirmance given; that during all that time except about three years complainant lived in Chicago, about sixty-five miles from said land—three hours' ride by railroad—and never notified decedent or these defendants that she had or claimed any interest in said land or that there was any defect in said deed or the execution thereof, or of her intention to disaffirm and hold it void; that during said time she frequently visited Laporte County and saw and talked with

decedent, but failed to intimate or assert any claim, title or interest in the land or to disaffirm said deed.

They further say she failed and neglected to commence this suit till after two years had elapsed from the alleged date of her divorce, and that her action is barred by the statute of limitations.

They admit that at the time of the execution of said deed there were certain improvements on the land, to wit: A dwelling house, about fifty acres under fence and an old barn, but no other improvements; that the net rental value of the land for the first fifteen years was $150 per year, and for the last ten years $200 per year and no more; that decedent and these defendants have received the same.

Further say that after the execution of said deed and after complainant attained the full age of 21 years, she, by her acts and otherwise, confirmed, ratified and elected to stand by her acts and deed, wherefore they say she cannot have and maintain this action. They deny all unlawful combination, confederacy, etc.

GENERAL REPLICATION by complainant, filed Jan. 15, 1875.

BY STIPULATION, cause referred to J. D. Howland, Master in Chancery, to take proofs and report the same with his findings thereon. (Pr. Rec., p. 7.)

THE MASTER'S report finds: That on the 3d day of April, 1845, Hugh Graham being seized in fee of the land in dispute, conveyed the same by deed to his married daughter, Anna M. Sims, the complainant, subject to a mortgage to the State, of $400. That May 28, 1847, she, joining with her husband John B. Sims, conveyed the same land for the consideration of $1,300 to Magdalena Everhardt, subject to the mortgage of $400 and one year's interest in arrear. That the deed was duly subscribed by complainant and her husband in presence of Samuel E. Williams, and was acknowledged in regular form, and delivered on the day of its date, and the price paid.

That the evidence conclusively establishes that on the 28th day of May, 1847, the complainant was under twenty-one years of age; that if human testimony can establish anything, she was born Sept. 25th, 1828.

That Magdalena Everhardt went into immediate possession, paid to the State the mortgage debt, $456; paid taxes and

made improvements until her death in October, 1871. That by her will, duly executed and probated, the defendants, William Everhardt and Elizabeth Burson, were named executors, and to them as children of Magdalena, with their sister Margaret Darlington, the land with other property of the testatrix was devised; that they hold it to this day and have continued to pay taxes and to improve the property.

That at the date of the deed whose validity is questioned, Mrs. Sims, with her husband and children, was living in the town of Laporte; that although not of full age until Sept. 25th, 1849, she had been married since July, 14th, 1844; was a mother, and of such appearance that she might readily have been taken for over twenty-one; indeed, was regarded by many who knew her as of full age. That at the time of the purchase, and before delivery of the deed or payment of the purchase money, it occurred to Mr. A. L. Osborne, then as now a practicing lawyer of Laporte, to suggest to the agent who acted on behalf of Mrs. Everhardt, to assure himself that Mrs. Sims was of age. The result of this hint was that Mrs. Sims, with her husband, came to Osborne's office and there, upon the face of the deed, the declaration following was written:

"The above mentioned Ann M. Sims, before the delivery of the above deed, and before the payment of the above money or any part thereof, voluntarily, and as an inducement to the said Everhardt to consummate the bargain, accept the deed, etc., states and declares that she was twenty-one years of age on the 25th day of September, A. D. 1846. Signed May 28th, 1847, in presence of Samuel E. Williams. ANN M. SIMS."

Mr. Osborne had filled up the deed and written the above declaration before the execution of either, and after Mrs. Sims had been told that question was made about her age and instructed that her deed, if she was not twenty-one, would be void, she declared she was of full age and gave the date at which she became so.

The Master then refers to the several defenses urged, viz.:

1. That the only disability of complainant when this deed was made was infancy. Therefore the deed was not void but voidable merely, and that a disaffirmance of the act must be made within a reasonable time after disability is removed, and this was not done.

This proposition is discussed at some length, but the Master makes no finding under this issue.

2. As to the Statute of Limitations, it proceeds upon the theory of the defense, that the disability was certainly removed upon the divorce of John B. and Anna Maria Sims. They were divorced February 14th, 1870. The statute allowed two years after the removal of the disability or until February 14th, 1872. The statute made the issuing of the process the commencement of the action. The complaint was filed February 10th, 1872. The process was prepared and sealed at once, but was not served until the 24th or 25th. When was it delivered to the sheriff? Was actual delivery necessary? These are questions which have been seriously contested.

The Master finds that the process was brought directly under the eye of the Sheriff at the moment of its sealing, and that it was placed in the depository in the clerk's office, which had been designated by that officer, and whence he and his deputies had habitually taken the process issued by the clerk, and that there is no foundation for this defense.

3. That the effect of the solemn declaration of the complainant that she was of age, made to induce the acceptance of the deed, and the payment of the money is in the nature of an estoppel.

The Master says: Mrs. Sims was indeed a minor, and her deed and its delivery, taking the lowest view, were voidable acts and at some uncertain future it would be in her power to avoid them and reclaim her property. But she does more than this; she declares in the most solemn manner when she cannot say that she is under coercion of her husband, when she is protected by the presence of others, and when she is fully advised of the effect of a deed made by an infant, that she is of full age, and fortifies the statement by the added untruth that she came of age on a particular day which she named. She remained some time afterwards in the neighborhood, a year or so, and never communicated the fraud to Mrs. Everhardt. She knows that she has taken possession, that there is an encumbrance that she will propably pay, and for a year she is silent. And more than this; although she was not divorced until February, 1870, the evidence of her own daughters clearly shows that she was prac-

tically separated from her husband, probably as early as 1863, certainly not later than 1865. All this time she was silent. After her departure from Laporte she was back at least twice. Much of the time she had lived at Chicago, some sixty miles away, and if she could not visit Laporte, the mails were as free to her as to any one. It would be incredible that she had never heard of the old place and of the improvements made there by the purchaser. Now, under what circumstances does she come into court asking relief? She has committed a fraud by which she has enabled her husband to get $1,300, and to pay off a debt of $450. Married women are not protected in the commission of fraudulent acts. They are liable for such acts. Either as married woman or infant, when she made the false representation by which Mrs. Everhardt was choused out of her money, if this action can be maintained, she was liable at law for her tort. Yet she comes into a court of equity under all these conditions, fatal to success, and asks relief on grounds of strict law.

The complainant insists that it is unfair to make head against her on the ground that this is an equitable proceeding, saying that the complaint was originally in the State court, where, under the statute abolishing the distinction between actions at law and in equity, there could be no such grounds assumed by the defense. The answer to this is that in the State courts the forms of law and equitable proceedings are alike, but equitable principles are not abolished. This case was docketed in this court upon its equity side. It cannot be said that it would have been improperly docketed had it been placed on the law side of the court. But this direction of the cause was accepted by complainant and a bill in Chancery was filed in which a fraudulent conspiracy was charged against Mrs. Everhardt, the testatrix of defendants, and equitable relief was sought; that is, that the cloud should be cleared from complainant's title, the deed of May 28th, 1847, given up and cancelled, an account taken of rents and profits, and possession of the land awarded.

And the Master thus holding that the doctrine of equitable estoppel is applicable to complainant, advises a decree for defendants, and that the bill be dismissed. (Pr. Rec., pp. 8–11.)

With his report the Master also filed the evidence with an index and memorandum thereof.

Only a brief reference to the evidence further will be necessary here. When Hugh Graham, on the 3d day of April, 1845, conveyed the farm in question to the appellant, his married daughter, he at the same time confided to her care his other four small children, and the care and maintenance of these chilren by her thereafter, as well as his love and affection, undoubtedly formed the consideration of the deed. After charging her to keep the farm as a home and never to sell without consulting him, he left for California where he had sons residing, and has since died there. She resided on the land but a short time and then, upon her husband's urgent request, moved into Laporte. Her marriage proved an unfortunate one. Immediately after the departure of her father, her husband seems to have commenced his importunites to sell the farm. Her refusal for a time, in accordance with her father's wishes, seemed only to intensify his ill-treatment. He resorted to threats and violence. She was in poor health, weak and suffering from disease, with five small children dependant upon her for support—one of her own and four of her father's—and his long-continued ill-treatment had reduced her to that abject mental condition indicated in her evidence. "Just a look from him," she says, "would make me do most anything." She was a worthy but uneducated country girl in the nineteenth year of her age, and during the last three years thus broken down by the ill-conduct of her husband. At this time, and while in this state of mind, she says her husband came in with three other gentlemen, strangers to her, and presented her a deed and asked her to sign it. She knew nothing about any actual arrangement to sell until that time, but her husband's influence over her was sufficient to secure the prompt execution of the instruments in the form of a deed, which bears date May 28th, 1847, and purports to convey her property to one Magdalena Everhardt. Whatever consideration was paid went into her husband's hands and was squandered by him. The appellant resided in Laporte about one and a half years thereafter, and then moved to Milwaukee, Wisconsin, where she remained about two years; thence she removed to Chicago, Illinois, where she resided until 1856; thence she went to Fort Madison, Iowa, where she remained until 1861; thence back to Chicago, where she has since resided. She has

never been to the farm since she signed the deed. She has been to Laporte twice, once on the occasion of a sister's death. (Mrs. Sims' Ev., Pr. Rec., pp. 15 to 19.) The property is admitted to be now worth $6,000. (Pr. Rec., p. 72.)

In 1868, through a son-in-law, she consulted counsel in reference to recovering this property. An examination of the title was made and some correspondence ensued, but it seems the influence of her husband was still potent enough to frustrate her efforts. He visited her attorneys at Laporte and vigorously protested against bringing suit. And no suit was instituted. (Biddle's Ev., Pr. Rec., p. 23.) Soon after this time she applied to a court in Illinois for a divorce from her husband, and Feb. 14, 1870, a decree was granted. And then she made another effort to recover her land. She secured the services of one James M. Flagg, an attorney of Chicago, who went to Laporte and sought out Mrs. Everhardt, the grantee named in the deed, and notified her that appellant disaffirmed the deed on the ground that she was a minor when it was executed, and made a formal demand for the possession of the property. (Flagg's Ev. Pr. Rec., p. 47.) Upon Mrs. Everhardt's refusal to give up possession, or compromise the matter in any way, appellant, by her attorneys, Flagg & Ellis, of Chicago, commenced an action in the Laporte Circuit Court, of Indiana, to recover possession. It seems that her counsel in this case, inadvertently, no doubt, neglected to file a bond for costs, and at the April Term of the Laporte Circuit Court, 1870, upon defendants' motion, the suit was dismissed for this technical neglect. (Pr. Rec., p. 52.)

On the 10th of February, 1872, this, the second suit, was commenced in the Laporte Circuit Court, as stated by the Master.

EXCEPTIONS were duly taken by complainant to the Master's report as follows:

1. For that said Master rejected the entire evidence of complainant except only that as to her age.

2. For that said Master does not correctly report the facts in stating that May 28, 1847, complainant, joining with her husband, conveyed the land in controversy, etc., nor in speaking of the paper so signed as a deed duly acknowledged, etc.

3. For that said Master in his report finds the complainant guilty of fraudulent conduct and false representations at the time said pretended deed was executed, and that this, in connection with her subsequent conduct prior to her discoverture, operates by way of *estoppel in pais*. Exception is taken to his charges and findings of fraud and to his arguments and conclusions therefrom as being unwarranted.

4. For that said Master finds and so states that the improvements made upon the land since the pretended execution of a deed thereof by complainant and her late husband were lasting and valuable; stating that many hundreds of dollars were spent in improvements, while no reference is made to the rental value of the land; that such statement is one-sided and partial, and is not warranted by the evidence; that a fair construction of the evidence upon this point would be that only a small portion of the net profits derived from the land were expended thereon, that the farm has only been kept in decent order and the buildings in decent repair with a view to such profits; and that the evidence taken together clearly shows that the rental value of the land since in the possession of the defendants or Mrs. Everhardt far exceeds the value of all improvements or repairs made by her or them.

5. For that said Master's report as to this cause being on the equity side of the Court, and complainant's agency therein is incorrect. The cause is here on motion of the defendants.

6. For that said Master advises a decree for the defendants, and that the bill be dismissed. Upon the evidence submitted she insists that she is entitled to the relief asked.

Upon argument the exceptions were partially sustained, as appears by the following ORDER entered by the Court Dec. 27th, 1875:

"Come again the parties, by their respective counsel, and the exceptions to the Master's report are now submitted and argued, and the Court, being advised in the premises, doth now sustain the said exceptions to so much of the said report of the Master as finds that the complainant was estopped by the declaration in writing made by her upon said conveyance, and also to so much of said report as finds that said complainant had not in due time disaffirmed her said conveyance."

A re-argument of the case was asked by the defendants and granted, and Feb. 14th, 1877, a further order or FINAL DECREE was entered modifying the foregoing order, as follows:

"This cause having been further argued by the counsel of the respective parties, and the Court being now sufficiently advised, it is ordered that the last part of the order made in this case on the 27th day of December, 1875, as to the disaffirmance of the said plaintiff be set aside, as not having been found by the Master in his report; and the cause having been submitted to the Court upon the pleading evidence and the report of the Master, and it appearing to the Court that the said plaintiff had not disaffirmed the deed made by her on the 28th of May, 1847, referred to in the pleadings, within a reasonable time after arriving at her majority; and the Court being satisfied that the rule is established in this State [Indiana] that she must have so disaffirmed the said deed, notwithstanding her coverture, the Court finds the equities with the defendants, and dismisses the plaintiff's bill of complaint at her costs. It is therefore ordered and decreed that the plaintiff do pay to the defendants their costs herein wrongfully expended taxed at $——. All which is finally ordered, adjudged and decreed." (Pr. Rec., pp, 14, 15.)

And thereupon the complainant appealed to this Court, and assigns errors upon the record as follows:

ERRORS ASSIGNED.

And now comes Anna M. Sims, the appellant, by Robert Rae and Arthur D. Rich, her solicitors, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

1. The Circuit Court erred in holding that any disaffirmance of the deed, or instrument purporting to be a deed, executed May 28th, 1847, was necessary or requisite.

The appellant insists that the instrument was absolutely void and of no effect by reason of the double disability of infancy and coverture which existed at the time; that while resting under these disabilities she was by the common law utterly incapable of executing a valid deed of her land, and there was no statute law then in force in Indiana enabling an infant *feme covert* to convey. If void, of course it follows that no disaffirmance of the instrument was necessary.

2. The Circuit Court erred in holding that the appellant had not disaffirmed the deed or instrument above mentioned within

a reasonable time after arriving at her majority; and that the rule is established in Indiana that she must have so disaffirmed the said deed, notwithstanding her coverture, as fully stated and set forth in said final decree of Feb. 14th, 1877.

If her deed be held voidable only and not void, still the appellant insists that her coverture excused her from any obligation to disaffirm while the disability existed; and that she brought her action within a reasonable time, that is, within the two years prescribed by the Indiana statute of limitations after this disability was removed by her divorce.

3. The Circuit Court erred in denying the relief prayed by appellant's bill and in dismissing her said bill on final hearing.

By reason whereof the said appellant prays that said decree may be reversed, etc.

ROBERT RAE,
ARTHUR D. RICH,
Solicitors for Appellant.

BRIEF OF THE ARGUMENT.

We shall endeavor to show :

I. That the instrument purporting to be the deed of appellant, dated May 28, 1847, is absolutely void and of no effect, because she was at the time an infant wife, having by the common law no power to convey her land, and there was then no statute law enabling her to convey.

Hoyt v. *Swar*, 53 Ill., 134.
Harrer v. *Wallner*, 80 Ill., 197.
Rogers v. *Higgins*, 48 Ill., 211.
Sandford v. *McLean*, 3 Paige Chy., 117.
Chandler v *McKenney*, 6 Mich., 217.
Adams v. *Ross*, 1 Vroom (N. J.), 513.
Schroder v. *Decker*, 9 Penn. St., 14.

And other cases are cited in the argument.

An *infant feme covert* was not enabled to alienate her land by the Indiana statutes in force when the alleged deed was executed. Rev. Stat. Ind., 1843, Ch. 28, §§ 1, 2, 17, 40, 41, 206, 207. These sections are printed at length in the argument. If the deed was void, of course no disaffirmance thereof was required.

II. But if it be held that the deed was voidable only, still, having since disaffirmed it and brought her action to recover the land, it is thereby rendered void *ab initio*, unless she was equitably estopped from so disaffirming, or is barred by the statute of limitations. 2 Bishop on Mar. Wom., §§ 516, 522, and authorities cited.

III. That she is not barred, but has brought her action within the time prescribed in the saving clause of the statute of limitations. She was under the two co-existing disabilities of infancy and coverture when her right of action accrued, and hence was not obliged to act until both were removed. Wells' Limitations, § 150, p. 191; Angel's Limit., §§ 198, 481; Plowden, 375. The Indiana limitation laws (code of 1852) save the rights of persons under legal disability two years after the disability is removed.

2 *Gavin* v. *Hord* p. 158. The evidence shows, and the Master's finding is, that the appellant has brought her action within that time.

IV. We insist that there is no proof of facts which may properly be regarded as matter of equitable estoppel. (Pr. Rec., pp. 16 to 22, 41, 60, 69.) And if such facts existed the doctrine of equitable estoppel does not apply to appellant while her coverture continued.

Behler v. *Weyburn*, 59 Ind., 143, and cases cited.
Unfried v. *Heberer*, 63 Ind., 67. 72.
Richard v. *O'Brien*, 64 Ind., 518.
2 Bishop On Mar. Wom § 489.

It was in deference to what the learned judge in the Circuit Court considered a rule of property established in Indiana, which he was not at liberty to disregard, that he held appellant must disaffirm her deed within a reasonable time after arriving at her majority, notwithstanding her continued coverture. It so appears from the final decree. The *dicta* in *Scranton* v. *Stewart*, 52 Ind., 94, and the cases cited therein are relied on as establishing such rule. We think it a mistake. But if such rule ever existed, it has since been repudiated and utterly overturned by the same court which established it. It is now broadly held in the later cases in Indiana as in other States that a married woman cannot be divested of her title to land by matters of estoppel *in pais;* by her conduct, acts, or passive silence. *Behler* v. *Weyburn*, *supra*, and other Indiana cases cited. Hence there would appear to be now no foundation for such decree in the court below.

ARGUMENT FOR APPELLANT.

May it please the Court: We now proceed to argue briefly the points stated, to cite the statutory provisions, and refer more at length to the authorities on which we rely for a reversal of the decree of the Circuit Court.

I.

In the first place we maintain that the deed in question, having been executed while the appellant was an infant wife, was absolutely void; because there was then no statute law in Indiana enabling her to convey her land, and by the common law she had no power to convey.

That by the common law adopted in Indiana a *feme covert* was utterly powerless to convey her land by deed or make any contract will not be disputed. It has been so uniformly held in that as well as in other states: *Woods* v. *Polhemus*, 8 Ind., 64; *Baxter* v. *Bodkin*, 25 Ind., 172; *Mattox* v. *Hightshue*, 39 Ind., 95; *Kinnamon* v. *Pyle*, 44 Ind., 280.

Now, bearing in mind that the disability of coverture means the total incapacity in the wife at common law, the want of power in her, to convey, or make any contract, we have only to examine the statute to see to what extent her common law disability is relieved, and power to execute a contract is conferred upon her. So far as the statute in express terms enables her, she may go, and no further. And in construing such State statute, it will also be borne in mind that it is in derogation of the common law, and hence must be strictly construed. If her incapacity is relieved, and the power is by statute expressly conferred upon her to convey or contract, she may act in the manner provided and her acts are valid. If the power is not conferred, it follows that her conveyance or contract of any kind is absolutely void; of no force or effect whatever.

The statutes of Indiana, as revised in 1843, upon the subject of the alienation of land were still in force in 1847, when the deed in question purports to have been executed. Looking

into this revision, Chapter 28, entitled, "Of real property and the alienation thereof," we find the first section, defining who may hold land, as follows:

"SECTION 1. Every citizen of the United States is capable of holding lands within this State, and of taking the same by descent, devise, or purchase." (R. S. Ind., 1843, p. 414.)

The next section specifies who may *convey* land, and it is clearly *not* broad enough to include an *infant feme covert*.

"SEC. 2. Every person capable of holding lands, who may be seized of or entitled to any estate or interest in lands, *except* idiots, persons of unsound mind and *infants*, may alien such estate or interest at his pleasure, with the effect and subject to the restrictions and regulations provided by law."

In view of the exception in this section is there any ground for insisting that an *infant feme covert* is thereby enabled to convey her land? Is it not as clear as language can make it that the appellant is expressly excluded from that class of persons who are empowered to alienate their lands?

Other sections follow in the same chapter giving the restrictions and regulations referred to, and pointing out the manner in which a wife may convey her land, but in view of the foregoing section they can have no reference to an *infant* wife:

"SEC. 17. The joint deed of the husband and wife, upon complying with the provisions of the fortieth section of this chapter, shall be sufficient to convey and pass the real estate of the wife, but not to bind her to any covenant or estoppel therein.

"SEC. 40. The acknowledgment of the execution of any deed or conveyance by which a married woman releases and relinquishes her dower in any lands conveyed, granted, or assigned by her husband, or by which the husband and wife convey the real estate of the wife, may be taken before any officer herein authorized to take the acknowledgment of deeds, but such acknowledgment shall not be taken by such officer unless he shall first make known to her the contents or purport of such deed or conveyance, and she acknowledge, on a private examination, separate and apart from, and without the hearing of her husband, that she executed such deed or conveyance of her own free will and accord, and without any coercion or compulsion from her husband, all of which shall be certified to by such officer in his certificate of such acknowledgment.

Up to this point it will be observed that the plain language of the statute is, that a wife who has reached her majority (twenty-one years in Indiana) may, by complying with certain

forms prescribed, either release her dower in her husband's lands or convey her own. Now follows a section which enables a wife who is *under* twenty-one years of age and over eighteen, and under still further restrictions and safeguards to *release her right of dower*, but it is significant that she is *not* enabled, while so under age, even with the additional safeguards mentioned, to convey her *own* land.

"SEC. 41. Any married woman over the age of eighteen years, and under the age of twenty-one years, *may release and relinquish her right to dower* in any lands of her husband, sold and conveyed by him, by executing and acknowledging the execution of such conveyance, as provided in the last preceding section, if the father or guardian of such married woman shall declare, before the officer taking such acknowledgment, that he believes that such release and relinquishment of dower is for the benefit of such married woman, and that it would be prejudicial to her and her husband, to be prevented from disposing of the lands thus conveyed, which declaration, with the name of such father or guardian, shall be inserted as a part of the certificate of the officer taking such acknowledgment."

But there is no section or provision whatever which enables an infant wife, under any circumstances, to convey her lands. These sections are all we find bearing upon the subject. Reading them together, the purpose and intent of the Legislature seem obvious. There is hardly room for doubt or construction. The power is conferred upon a wife who has reached the age of twenty-one years, to release her dower and convey her separate estate upon compliance with certain prescribed forms intended to remove her from any undue influence or coercion of her husband. And under still further restrictions, requiring the presence and consent of the father or guardian of an infant wife, she is enabled, while over eighteen and under twenty-one years of age, to *release her right of dower*. But only this; no power is given to convey her separate estate. The Legislature not only omitted to confer the power upon an infant wife to convey her land, but from the section last cited the deliberate purpose of the Legislature is clearly manifest to *withhold* such power.

Indeed, this intent appears from other sections of the same chapter. Section 206, p. 449, declares: "A general and beneficial power may be given to a married woman to dispose by grant, conveyance or devise during the marriage, and without

the concurrence of her husband, of lands conveyed or devised to her in fee." But the next section, 207, prohibits the exercise of such power by an infant wife, declaring that no such "power vested in a married woman during her infancy can be exercised by her until she attain her full age."

The deed in question, purporting to convey the appellant's land, was executed while she was an infant wife, incapable at common law of making a conveyance. If we are correct in our view that these provisions of the Indiana statute law clearly fail to relieve an *infant feme covert* of her common law disability; fail to confer upon her the power to convey or impliedly pro hibit such conveyance, it follows that the instrument is only in form a deed, and is absolutely void and of no effect, and hence incapable of ratification and requiring no disaffirmance.

We will now refer the Court to some authorities where similar statutes have been construed:

The general disabilities of coverture, the absolute incapacity of a married woman to execute a deed without an enabling statute, and the results flowing from an attempt by her to execute one, are clearly and forcibly pointed out in *Rogers* v. *Higgins*, 48 Ill., 211. It appears that one Ann Wright, a married woman residing in New York, and owning a lot in Chicago, in October, 1845, joined with her husband in the execution of a deed of the same in due form, to one Elizabeth Rogers, receiving in consideration $400, the full value of the property, and possession was taken by Mrs. Rogers. The deed was executed during a period of time when there was no statute law in Illinois enabling married women, *residing out of the State*, to convey their lands lying in the state. By some inadvertance the legislature had failed to name this class of persons in the enabling statute. After a subsequent statute, curing this defect in the law, Mrs. Wright, in 1863, conveyed the lot to one Higgins by quit claim deed, and the latter brought ejectment. The heir-at-law of Mrs. Rogers filed a bill in the Superior Court of Chicago to enjoin the ejectment suit. His bill, on hearing, was dismissed and he appealed. The Supreme Court, Walker, J., in a very able and elaborate opinion, *held* that married women, being incapable at common law of executing a deed or other contract, and the statute in force when the deed to Rogers was executed, not hav-

ing expressly conferred upon *non-resident* married women the power to convey their land lying in Illinois, the result was a total want of power or capacity in Mrs. Wright to act; that her deed of 1845, although executed with all due formalities required by statute of resident married women, was yet utterly void; that it affected her rights in the land no more than if it had remained a blank piece of paper, or her name to it had been forged; that neither law nor equity could breathe any life into it, or afford any relief in the case, whatever the hardship upon the grantee; and that even the legislature, by subsequent enactment, could give it no force or effect; that to grant relief in such case would be against the policy of the law which creates disabilities, would destroy the safeguards thereby thrown around the weak, and invite a violation of the law; and that while it might promote justice in a few cases, its general effect would be productive of great wrong and injustice. So held also in *Lane* v. *Soulard*, 15 Ill., 125.

In Indiana both sexes attain their majority at twenty-one years. In Illinois females reach their majority at eighteen; males at twenty-one. In Illinois a statute law declares that a "married woman, being above the age of eighteen years"—that is, of full age—may, under certain conditions prescribed, convey her land. By repeated decisions of the Supreme Court of Illinois construing this statute, the deed of a married woman executed before reaching that age has been held absolutely void. The meaning of the statute is precisely like that in force in Indiana in 1847, as we have shown.

Hoyt v. *Swar*, 53 Ill., 134, was ejectment to recover land claimed by Mrs. Hoyt. Defense under deed by Hoyt and wife while wife was under age. Opinion of the Court by Lawrence, J., and it is said: "The settled doctrine is that although there are cases in which equity will enforce on equitable grounds a charge upon the lands of a married woman, yet as at common law she could convey her lands only by fine and recovery, for which our statute has substituted a conveyance executed jointly with her husband and acknowledged in a particular manner, it necessarily follows that a conveyance not within the authority of the statute is void. She can alien her lands by a conveyance only on such terms and in such mode as the statute authorizes,

as her power to convey by deed is wholly derived from the statute. Now, the statute authorizes a married woman to convey only when she has attained the age of eighteen years. Her deed, made before she has attained that age, is as ineffectual, to pass the title, as if the statute had not enabled her to convey at all. It is not the disability of infancy merely that affects the deed, but the fact that the statute, while recognizing the common law disability of coverture, removes it only in reference to deeds executed in a particular mode by married women who have attained a specified age. If the deed is executed before the prescribed age it must be held equally beyond the reach of the statute as if executed after the proper age, but not in the prescribed form. As, in the case of *Rogers* v. *Higgins ubi supra*, and *Lane* v. *Soulard*, 15 Ill., 125, the deed of a married woman, executed without this State, was held inoperative, because executed by a married woman under the age of eighteen years, the statute only authorizing married women who have attained that age to convey." And so held in *Harrer* v. *Wadlner*, 80 Ill., 197.

These cases are in harmony with an early case decided by Chancellor Walworth.

In *Sanford* v. *McLean*, 3 Paige, chy., 117 a bill was filed to restrain the widow of James McLean from proceeding at law to recover her dower in a house and lot in the City of New York, and to compel her to execute a release of dower to complainant. Ch. Walworth, 1832, said: "Independent of this fact, however, the conveyance by this infant *feme covert* was clearly void, notwithstanding it is acknowledged by her, apart from her husband, in the form prescribed by the statute. * * The statute which makes valid the deed of a *feme covert*, when executed with her husband and acknowledged by her on a private examination, was never intended to sanction or validate a conveyance by an infant wife."

And the Chancellor then proceeds to point out the obvious distinction between the disabilities of coverture and infancy.

And upon the same point we also refer to the following authorities:

Chandler v. *McKinney*, 6 Mich., 217.
Cunningham v. *Knight*, 1 Barb., 399.

Adams v. *Ross*, 1 Vroom (N. J.), 513.
Schrader v. *Decker*, 9 Penn. St., 14.
Cason v. *Hubbard*, 38 Miss., 35.
Cronise v. *Clark*, 4 Md. Chy., 413.
McCarty v. *Murray*, 3 Gray, 578.
Jones v. *Todd*, 2 J. J. Marsh, 361.

The statute clearly failed to relieve an *infant feme covert* of her common law disabilities, so far as to give her the power to convey. The deed in question, purporting to convey her land, was executed while the appellant was an infant wife, incapable at common law of making the conveyance, and with no power conferred upon her by statute. It follows that the deed was absolutely void, from want of power or capacity to execute it, and hence incapable of ratification and requiring no disaffirmance.

But it may be urged by counsel that the Supreme Court of Indiana, construing the statute of 1843, have held the deed of an infant married woman voidable only, and not void; and the following cases referred to in support of this position, viz: *Doe* v. *Abernethy*, 7 Blackf., 445; *Hartman* v. *Kendall*, 4 Ind., 403; *Gatling* v. *Rodman*, 6 Ind., 289; *Pitcher* v. *Laycock*, 7 Ind., 398; *Johnson* v. *Rockwell*, 12 Ind., 77; *Chapman* v. *Chapman*, 13 Ind., 396; *Miles* v. *Lingerman*, 24 Ind., 385; *Law* v. *Long*; 41 Ind., 595; *Scranton* v. *Stewart*, 52 Ind., 69.

We insist that the question as to whether the deed of an infant married woman, under this statute, is absolutely void, or only voidable, is still an open one in Indiana; that upon this point the statute of 1843 above referred to has received no deliberate judicial construction by the Supreme Court of that State. And the cases cited by counsel do not show that the question has ever been fairly before the court. *Doe* v. *Abernethy* merely holds the deed of an infant voidable. There is no doubt of it. In *Hartman* v. *Kendall* it is held that thirteen years' acquiescence by a party living in the vicinity of the land, after both disability of infancy and coverture are removed, with full knowledge of her rights, while improvements are being made, precluded her from avoiding the deed. The infant wife arrived at majority the same year her husband died. It was only a question of estoppel *in pais*. The question as to whether her deed was void, or only voidable, does not seem to have been considered, or to be necessarily involved in the case. So in *Gatling* v. *Rodman* and in *Pitcher* v. *Laycock*, 7 Ind., 398. In *Johnson* v. *Rockwell*, 12 Ind., 77, the court expressly avoid a construction of the statute. In *Chapman* v. *Chapman*, an infant wife, in a suit against her husband and his brother, asked that a convey-

ance by herself and husband, of her husband's land, be set aside, and that she be allowed support out of the land. It was set aside as to her. The question, as to whether the deed was void or voidable, was not involved. Nor was it necessarily involved in *Miles* v. *Lingerman*. It is true the parties seem to have treated the deed as voidable; that is, notice of disaffirmance was given. But that may have been done out of abundant caution, as in the case at bar. In that case it was wholly immaterial whether the court should hold the deed void *ab initio* or rendered void by disaffirmance. In either case the same result follows. In *Law* v. *Long* and *Scranton* v. *Stewart* the point was not necessarily before the court. The same judge delivered the opinion in both cases, and we shall have occasion to refer to them hereafter. The *dicta* would seem to indicate that he was under the erroneous impression that the doctrine of estoppel *in pais* was applicable to a *feme covert*. The *dicta*, at least so far as applicable to the case at bar, is overruled by the later cases. *Behler* v. *Weyburn*, 59 Ind., 143; *Unfried* v. *Heberer*, 63 Ind., 67.

We submit that upon a reference to these cases it will invariably be found that wherever the court speaks of such deed as merely voidable, it is manifestly through mere inadvertance; because the point was not pressed by counsel upon the attention of the court, or because the court did not at the moment have in mind the absolute incapacity of a married woman to convey except as enabled by statute, and the distinction between disability of coverture and that of infancy, or because the point was not involved or essential, or of any importance in the case. We do not think it can be fairly claimed that a judicial construction has yet been made by the Supreme Court of Indiana of the statute referred to, whereby it has become a settled rule of property in that State that the deed of an infant married woman, executed while the statutes of 1843 were in force, is voidable only; and we have no doubt that court, on a proper case presented, will feel entirely untrammeled by any of its prior decisions. And when such decision is reached, we have no reason to doubt it will be in harmony with the well-settled principles of law which hold such deed absolutely void.

It may also be urged that in other States such deed has been held voidable only. True, it has been so held, but with perhaps one or two exceptional cases, it will be found that the language of the statutes under which such construction has been given is very different from that of the Indiana statutes of 1843; that in those States the common law disability is relieved to a greater extent. The conveyance of a female infant *sole* would unquestionably be voidable only. And if, after coverture, by joining with her husband and otherwise observing the statutory

requirements, her deed is given the same effect as if *sole* and unmarried, it would follow that the deed of an infant *feme covert* by force of the statute would also be voidable only. In *Youse* v. *Norcoms*, 12 Mo., 560, the court construe the deed of an infant married woman as voidable expressly on the language of the statute. This is the reasoning of the court: "*That act* [of June 22, 1821] *provided that 'such deed shall be as effectual in law to pass all the right, title and interest of the wife as if she had been an unmarried woman.'* As the deed of bargain and sale made by an unmarried infant was voidable, it follows that a conveyance by a husband and wife of the wife's land, during the minority of the wife, was also voidable." And so in Kentucky, where it is said in *Oldham* v. *Sale*, 1 B. Monroe. 76, that "the statute of conveyancing of 1785, followed in this respect by all subsequent enactments on the same subject, *declares that a feme's covert acknowledgment shall be as effectual as it would have been had she been sole.*" And similar statutes are in force in Maine and Minnesota. 3 Wash. Real Property (3d Ed.), 228. In *Boole* v. *Mix*, 17 Wend., 119, it seems to have been assumed that the common law rule in relation to alienations by married women has not been adopted in New York. In *Greenwood* v. *Coleman*, 34 Alabama, 150, as in *Miles* v. *Lingerman*, *supra*, the question as to whether the deed was void or only voidable was not before the court. Whether void or voidable the same result would be reached. The court treated the deed as voidable; held that the bill in that case filed was an appropriate mode of avoiding it, and granted the relief prayed for, precisely as if it had held the deed void.

We find no well considered case in Indiana or in other States where the question has been fairly presented and considered, where it has been held under statutory provisions concerning the alienation of land by married women similar to those in force in Indiana in 1847, that the deed of an infant *feme covert* is voidable only. By the uniform current of authorities wherever the common law disabilities of coverture exists such deed seems to have been held, and must in reason be held, absolutely void. If so held, it disposes of this case; no other questions need be considered. This will be conceded by counsel. It would be clearly error in the court below to hold that a void deed required any disaffirmance.

II.

But in view of the evidence in this case, it is perhaps immaterial whether the instrument of May 28, 1847, executed by appellant, while she was an infant wife, be treated as absolutely void or voidable only. The learned judge in the court below seems to have regarded the instrument as voidable merely, and hence requiring disaffirmance.

The difference between a void and a voidable contract of an infant seems to be simply this: A void contract is a mere nullity incapable of ratification; a voidable one, at the option of the infant, may be ratified after majority and thereby become binding. If not so ratified, but is disaffirmed, it then becomes a nullity; and precisely the same result follows as if void *ab initio*. And neither a court of law or equity will give force and effect to a contract void *ab initio*, or to a voidable one which has been disaffirmed or which has not been ratified in some way. If the instrument referred to is void it will be conceded the appellant ought to recover her land; if held voidable only, with the ample proof she has, out of abundant caution, furnished that she has since disaffirmed, it is equally clear she is entitled to recover, unless equitably estopped from so disaffirming, or barred by the statute of limitations

A great deal has been said in this case about what *equity* will do. But it is an elementary principle that equity cannot impart life to a void contract, or to a voidable one which has been rendered void by disaffirmance. That would be making a contract for the parties where none existed. It is true, equity will, in such cases, where practicable without manifest injustice to any of the parties, will seek to place them in *statu quo;* that is, will restore, if possible, the consideration obtained on such contract. This it may do, on well recognized principles, without giving force and effect to a void contract, which would be absurd. To this extent equity may go, and thus afford more complete relief than can a court of law, which can only pronounce the contract a nullity. This would seem to be what the books mean in sometimes speaking of equitable relief in such cases. The relief is afforded, not by giving effect to the contract, but simply by restoring the parties to their original situation. In the case at bar the plaintiff seeks such restoration; and on her part offers complete restitution of the purchase money received and squandered by her husband This is all equity could require of her under any circumstances

The disaffirmance of the voidable deed of a minor is merely some positive act of dissent, clear and unmistakable in its character, adverse to the original act. Notice of disaffirmance, followed by acts of ownership or claim of title to the property, such as possession, suit to regain possession or to cancel the deed, payment of taxes, selling, leasing, or offering to sell or lease, or like acts, are said to constitute a disaffirmance. *Tunison* v. *Chamblin*, 88 Ill., 386; Tyler on Infancy and Coverture, Sec. 31, p. 70.

The appellant, through Flagg, her agent, in 1870 gave Mrs. Everhardt, the grantee named in the deed in question, notice of disaffirmance, demanded possession, and subsequently commenced suit to recover the land, which suit was dismissed on a technicality. Major Biddle, her agent and one of her attorneys, gave a similar notice to the defendants, Mrs. Everhardt's devisees, and made a further demand prior to the commencement of the present action. All this certainly constitutes a sufficient disaffirmance, unless she was at the time in some way estopped from disaffirming, or was already barred by some statute of limitations.

Was she so barred or estopped? We maintain she was neither, and proceed to those questions.

III.

It was strenuously urged in defense in the court below that the appellant's action is barred by the Indiana statute of limitations. The finding of the Master was against the appellees on this point, and we hardly think it will be seriously pressed here. But it may be well merely to refer to the statute.

The appellant's rights in the property in controversy must of course be determined by the laws in force when the alleged deed was given, and adverse possession was taken under the color of title—the Indiana statute laws of 1843. But a subsequent statute of limitations may paescribe the time within which her rights may be enforced; and the general rule, recognized in Indiana as elsewhere, is that the statute governs which is in force when the suit is brought. *Winston* v. *McCormick*, 1 Ind., 56; *Manchester* v. *Dodridge*, 3 Ind., 360.

When her action was brought the limitation statutes of 1852 were in force, and by these she must be governed, so far as they

prescribe the time within which her rights shall be enforced. These provisions of the statute are so plain that there is no room for construction. They provide:

"SEC 211. The following actions shall be commenced within the periods herein prescribed, after the cause of action has accrued, and not afterwards: * * * *Fifth*. Upon contracts in writing, judgments of a court of record, and for the recovery of the possession of real estate—within twenty years.

"SEC. 215. Any person being under legal disabilities when the cause of action accrues, may bring his action within two years after the disability is removed. 2 Gavin & Hord, p. 158

"SEC. 797. The phrase 'under legal disabilities' includes married women, persons within the age of twenty-one years, or of unsound mind or imprisoned, or out of the United States." 2 Gavin & Hord, p. 335.

The appellant's action may be said to have accrued when she executed the instrument purporting to be a deed, and surrendered the possession of her property in May, 1847. She was then under two co-existing disabilities, viz.: infancy and coverture. She became of age in September, 1849, and then her disability of infancy was removed. She continued uninterruptedly under coverture until February 14th, 1870, when this disability was removed by her divorce.

The plain and well settled rule is that when there are two or more co-existing disabilities in the same person when the right of action accrues, he is not obliged to act or sue until all are removed Wells' Limitation, §150, p. 191; Angel, Limit., §§ 198, 481, and note 4; Plowden, 375.

The saving clause of the English statute when Plowden wrote, gave five years instead of two, within which to bring the action after the disabilities were removed; and that learned commentator a century ago laid down the rule as *then* well settled, when there are two or more co-existing disabilities, as follows:

"And in this case [*Stowell* v. *Zouch*] they who argued on the part of Lord Zouch, agreed that if one had three or four of the defects or impediments, as if a woman who has present right, or when the future right falls, is covert, and within age, and not of whole mind, and in prison, and one, or two, or three of these defects or impediments are removed, as if the husband dies, and she is of full age, and let out of prison, the five years appointed to her by the statute shall not commence until the last defect or impediment is removed; and when she is void of all the impediments or defects, then the five years shall commence." Plowden Com., 375.

And this ancient rule for the interpretation of the statute in cases where there are two or more co-existing disabilities when the cause of action accrues, has since been universally applied wherever the common law prevails. It stands absolutely without question or exception. 2 Sug. Vend., 103 [482]; *Dugan* v. *Gettings*, 3 Gill., 138; *Butler* v. *Howe*, 13 Me., 397; *Jackson* v. *Johnson*, 5 Cowen, 74, *Demarest* v. *Wynkoop*, 3 John. Chy., 129; *Scott* v. *Haddock*, 11 Geo., 258. And it has been fully approved by this court; *Mercer's Lessee* v. *Selden*, 1 Howard, on p. 53.

If the saving clause in the Indiana statute means anything, it saves the rights of a married woman two years after her divorce or after the death of her husband.

This is not a case of cumulative disabilities. We are well aware of the settled rule that when a statute of limitations begins to run it will not be arrested by any subsequent disability. *Hogan* v. *Kurtz*, 94 Otto, 773. But that rule has no application here.

Mr. Cooley says: "What shall be considered a reasonable time must be determined by the legislature, into the wisdom of whose decision in establishing a legal bar, it does not pertain to the jurisdiction of courts to inquire." Cooley Const. Limit., 366; *Demass* v. *Newton*, 31 Ind., 222.

Mr. Bishop says: "If the infant is also a married woman, the disability of coverture enables her to postpone the act of avoidance to a reasonable time after the coverture is ended. 2 Bish. on Mar. Wom., 516, 522. And this "reasonable time" is fixed by statute in Indiana, as we have seen, at two years after the coverture is ended, and the Master's finding is that she has brought her action within the time. Upon the evidence and the Master's report thereon, we do not see how it can be seriously urged that she is barred by any statute of limitations.

IV.

But it may be insisted that appellant is equitably estopped from disaffirming after so long a period of delay and silence in regard to her rights, notwithstanding she was all the while under coverture. This is the point on which the learned Judge in the Court below decided the case adversely to her. Hence some discussion and reference to the authorities at some length may be excused.

Even on the assumption that the deed was merely voidable, we maintain that the appellant, having been under the disability of coverture also when her right of action accrued, she had the time which the limitation laws of the State gave her within which to assert her rights. The statute relieved her disability only to the extent of enabling her to convey by joining with her husband in a deed. While the disability continues the law requires no independent action of her and declares in substance that her words, conduct, silence, neglect, or omission to act, shall in no way prejudice her rights within the time fixed by law for her to assert them. And hence her mere neglect or omission to disaffirm a voidable deed cannot be treated as a ratification thereof, and her rights in the land be thereby divested. She can only ratify such deed and be divested of her rights by a fresh conveyance in the manner prescribed by law.

But the doctrine of *estoppel in pais* has been strongly urged in the defense of this case from the beginning.

It has been insisted (1) that the appellant made fraudulent representations of her age when the deed was executed; (2) that she also stood by without disclosing her claims for many years while large expenditures for permanent improvements were being made upon the property; and finally, (3) that she remained silent and inactive, and has neglected to disaffirm her deed or give any notice of such disaffirmance an unreasonable length of time after she became of age. And all these matters have been persistently urged, the counsel assuming that the doctrine of equitable estoppel is applicable to her notwithstanding her continued coverture.

In the first place it was claimed that the appellant made false representations of her age at the time of the execution of the deed in May, 1847, and was thereby estopped from now showing her true age. The defendants produced in evidence the original deed on which, after the acknowledgment, appears in writing, subscribed by the appellant, this falsehood:

"The above mentioned Ann M. Sims, before the delivery of the above deed, and before the payment of the above money or any part thereof, voluntarily, and as an inducement to the said Everhardt to consummate the bargain, accept the deed, etc., states and declares that she was twenty-one years of age on the 25th day of September, A. D. 1846. Signed May 28th, 1847, in presence of Samuel E. Williams. ANN M. SIMS."

In connection with the above document may be read on behalf of the defendants, the deposition of S. E. Williams, the subscribing witness (Pr. Rec., p. 669), and A. L. Osborne, one of the attorneys of record in this case (Pr. Rec., p. 61); and on behalf of the plaintiff, her own deposition (Pr. Rec., p. 15), and that of Mrs. Lord, her daughter, (Pr. Rec., p. 41.)

They did not see fit to submit the original writing to her and thus give her an opportunity to say whether her signature was genuine or not. But assuming it to be genuine, we think, on reference to the evidence, the Court must conclude: (1) That the purchaser was certainly put on inquiry as to her age at the time. (2) There was ample opportunity for ascertaining her exact age by reference to the family records then in her possession. (3) A neatly framed family record, giving the date of the birth of the appellant and other members of her family, then hung up in her house, and, it is at least probable, that this record, giving her true age, may have been brought to the attention of the agents of the purchaser. (4) That if she signed the document, she was fraudulently imposed upon, and signed it in utter ignorance of its contents, or, was coerced into signing it by her husband, or, by him acting in concert with the agents of the purchaser.

She testifies that she knew nothing of such writing on the deed; that if subscribed by her she did not read it, nor was it read to her; that she supposed she was simply executing a deed; that she never suspected the existence of any such writing until it was produced in this case. (Pr. Rec., p. 21.) Osborne, one of the attorneys in this case, who testified subsequently, contradicts her on some points. He says she called at his office in company with her husband and Burson, before the deed was executed and the matter of her age was talked over. She says she was never in a law office in Laporte in her life. Perhaps very little importance ought to be attached to the evidence of either of these witnesses, testifying as they do to occurrences twenty-eight years before. But we submit that as between her and Osborne, she is less liable than he, to be mistaken. The conveyance of her entire property was a serious matter to her; it was the great event of her life—the only conveyance she ever executed. All the circumstances attending it would be very likely to burn deeply into her memory, while as to Osborne, it was only an every-day business transaction. According to Osborne's statement, she neither said nor did anything in reference to her age, except in the presence of her husband and the agents of the purchaser, and the presumption of coercion holds, as it clearly ought, under such circumstances.

But the very fact that the agents of the purchaser thought it necessary to procure this written statement upon the deed, very strongly indicates that they actually knew the truth of the matter, and sought to bolster up an invalid instrument by a fabrication—by attempting to conceal the important fact which rendered the instrument invalid. The falsehood where it stands, written out by Osborne, the attorney for the purchaser, in itself affords strong ground for suspicion that the execution of the deed by the plaintiff was procured by fraud and undue influence; *Hugenin* v. *Basely*, 2 Lead. Cas. in Eq. 406. Here are the *clausulæ inconsuetæ*, pointed out in Twine's case as sure badges of fraud. And considering the situation of the parties, and all the circumstances under which the deed was executed, it is manifestly a proper case for the application of the maxim: *Clausulæ inconsuetæ semper inducunt suspicionem; Taylor* v. *Taylor*, 8 Howard 183.

Besides, she was completely under the influence and control of her husband. We think under all the surrounding circumstances disclosed in the evidence, she stands fully acquitted of any fradulent acts or intentions.

In any view of the evidence she certainly ought to be relieved of all personal responsibility for this falsehood written on the deed. It appears like the device of a smart lawyer, for the purpose of enabling the grantee to set up an estoppel against a simple-minded, uneducated girl, and thus effectually deprive her of the home which her absent father had given her. So much in vindication of the appellant.

But however this may be, she could not be thereby divested of the title to her land. A legal incapacity cannot be removed by a fraudulent representation of capacity. An estoppel *in pais* is certainly no more effectual to divest a title or work a grant than an estoppel by deed.

Behler v. *Weyburn*, 59 Ind,. 143.
Carpenter v. *Carpenter*, 45 Ind., 145.
Lowell v. *Daniels*, 2 Gray, 161.
Concord Bank v. *Bellis*, 10 Cush., 276.
Townsley v. *Chapin*, 12 Allen, 476.
Glidden v. *Strupler*, 52 Penn St., 400
Keen v. *Coleman*, 39 Penn St., 299.
Brown v. *McCune*, 5 Sandf. N. Y., 228.
Studwell v. *Shapter*, 54 N. Y., 249.
Todd v. *R. R. Co.*, 19 O. S., 514.
2 Bishop on Mar. Wom., § 489.

In *Brown* v. *McCune*, 5 Sandf. (N. Y.) 228, an action for goods sold, etc. Defense, infancy. Reply denying infancy, and averring that if defendant was an infant, he falsely and fraudulently represented himself to be of age, and thereby induced plaintiffs to sell him the goods, etc. It was held that the doctrine of estoppel *in pais* is clearly inapplicable to infants. The Court, Sanford, J., says: "In nearly every case where litigation has ensued, in consequence of the contract of infants, such contracts have been made either on the express statement or the tacit assumption, that such infants were of full age; and in the latter instance the suppression of the truth is as base as falsehood in the former. Yet there is no case to be found in which it has been held, that the infant on such a statement or assumption was bound by his contract. If he were thereby estopped from denying his majority, the contract would, of course, be adjudged valid and obligatory upon him A conrary doctrine would overturn the whole law relative to the contracts of infants. From holding that an infant was estopped by a falsehood as to his age, the next step would be to hold him estopped by a suppression of the fact that he was under age, when he was silent on that point, while he knew that the party with whom he was contracting supposed him to be of age. There is no difference in principle between the direct and the inferential falsehood; the one is as fraudulent as the other. Then, if we hold that an infant, buying merchandise on his statement that he is twenty-one years of age, is bound by his own contract, we must next hold that an infant executing a deed or mortgage of his real estate, is bound by it, because the act assumed that he was legally capable of executing such an instrument, and he omitted to inform the grantee, that his age incapacited him from so doing."

In *Lowell* v. *Daniels*, 2 Gray, 161, Mrs. Heffrein, a married woman, executed a deed to Hooton of her real estate, antedating it to a time prior to her marriage, and using the name she bore at that date without disclosing the fact of her marriage, and with the fraudulent purpose of giving the deed an effect which it would not have had in her true name and under a true date, knowing it would deceive and impose upon some person to be affected by it. It was held that she did not thereby estop herself and her heirs from setting up her title in the land as against her grantee, or against a purchaser from him without notice. The reasoning of the court is unanswerable, and the doctrine of equitable estoppel is placed on its true ground; it is clearly shown that this doctrine has no application whatever to a married woman where there is a want of power or capacity to convey without the assent of her husband.

Glidden v. *Strupler* and *Todd* v. *P. F. W. & C. R. R. Co.* are equally strong and emphatic upon the same point.

And on the authority of these cases the Court below decided this point against the defendants.

2. As to her standing by without disclosing her title for many years while large expenditures for permanent improvements were being made: In the first place the evidence fails to show that in point of fact any such improvements were made. The old house was finished and a small addition thereto was made, a cellar was dug, a barn built, the orchard grafted, some new fences built and the old kept in repair; all this to secure and enjoy the products of the farm. And it must be apparent that the aggregate expenditures for the whole time since Mrs. Everhardt took possession have been much less than the aggregate rental value. (Coplin's Ev. Pr. Rec., p. 55; and Darlington's on behalf of Defendants, Pr. Rec., p. 77.) It cannot be fairly claimed that any permanent improvements have been made. It would rather appear that only a small portion of the income of the farm had been necessarily expended in keeping it in running order. And secondly, a reference to the evidence will show that there is no ground for the charge that she "stood by," as the law construes that term in Indiana or elsewhere, while these expenditures were being made. She testifies that she remained in Laporte about a year and a half after the execution of the deed, and then moved out of the State, and has never since resided there. The evidence fails to show that she had actual notice of any expenditures for improvements, permanent or otherwise, and there are no facts from which notice can be fairly inferred. In fact, she knew nothing about it. The Master, in his report, gravely says that "if she could not visit Laporte, the mails were as free to her as to any one." Certainly, and the mails would have been free to her in France.

But, what could it avail the defendants if it were true that she thus stood by and permitted expenditures for permanent improvements to be made upon her property?

If true, it is clear on the authority of the cases just cited, such conduct during her coverture would work no estoppel against her; that she could not be thereby divested of her interest in the land. If her deed be held voidable merely it could not be thus

ratified. In *Vouse* v. *Norcoms*, *supra*, it was admitted that Madame Vasquez had acquiesced, standing by in silence during thirty years while valuable improvements were being made on her property, but having been all that time under coverture, it was held that she was not thereby estopped from asserting her rights in the property.

In 2 Smith's Leading Cases (6th Am. Ed.), after an able and thorough review of the authorities upon the equitable doctrine of estoppel *in pais*, on p. 755, it is said that "the opinion expressed in Sugden's treatise on Vendors, and Story's Equity, that a married woman may be estopped by standing by while her property is sold without warning the purchaser, *should probably be understood as referring to cases where her power over it is unfettered, and may be exercised without the assent of her husband.*"

And on the authority of these cases the court below ruled against the defendants on this point.

3. But, finally, it was insisted that the appellant remained silent and inactive, and neglected to disaffirm her deed or give notice of such disaffirmance an unreasonable length of time after she became of age, and that by such silence, neglect or omission to act, notwithstanding her coverture, she is estopped from now disaffirming her deed. This is the precise point on which the defendants succeeded in the court below. She cannot recover the property, the court said, because (in the language of the final decree) she "had not disaffirmed the deed made by her on the 28th day of May, 1847, referred to in the pleadings, within a reasonable time after arriving at her majority; and the court being satisfied that the rule is established in this State that she must have so disaffirmed the said deed, notwithstanding her coverture," etc.

We admit that she remained silent and inactive, neglecting to disaffirm her deed for a great length of time—perhaps an unreasonable time counting the years merely—after she became of age, but she continued all this time under coverture and legally and practically subject to the will of her husband.

Now, where merely the single disability of infancy exists, it is laid down in the text-books as a well-settled rule that mere silence or acquiescence is no confirmation of a voidable deed, unless prolonged beyond the statutory period of limitation. The

learned editors of American Leading Cases, upon a review of the authorities, say:

"Where land has been sold by an infant, it was said, in *Kline* v. *Beebe*, 6 Connecticut, 494, where the acquiescence was for thirty-five years, that the infant ought to declare his disaffirmance within a reasonable time, and similar dicta may be found in other cases; *Holmes* v. *Blogg*, 8 Taunton, 35; *Richardson* v. *Boright*, 9 Vermont, 369; but *there seems to be no doubt upon the decided cases, that mere acquiescence is no confirmation of a sale of lands unless it has been prolonged for the statutory period of limitation, and that an avoidance may be made at any time before the Statute has barred an entry.*" 1 Am. Lead. Cases, *256.

So in Ewell's Lead. Cas. on Inf. and Cov., pp. 98 and 101, where the cases are collected.

In *Baker* v. *Kennett*, 54 Mo., 90, it is said: "Where the infant makes a conveyance of real estate, his mere failure for years to disaffirm affords no proof of a ratification. There must be some clear or positive act performed for that purpose. The reason is plain enough. By his silent acquiescence he occasions no injury to other persons, and secures no benefits or new rights to himself." Also see *Huth* v. *Railroad Co.*, 56 Mo., 202; *Allen* v. *Poole*, 54 Miss., 323; *Green* v. *Green*, 69 N. Y., 553. And this court has repeatedly recognized and approved the rule; *Irvine* v. *Irvine*, 9 Wallace, 626; *Tucker* v. *Moreland*, 10 Peters, 75; *Bank of U. S.* v. *Lee*, 13 Peters, 107, 119; *R. R. Co.* v. *Dubois*; 12 Wol., 47, 64. There must also be the element of fraudulent intention on the part of the person to be estopped, especially where the title of land is in controversy. Indeed, this element of fraud underlies the whole doctrine of equitable estoppel. *Brant* v. *V. C. & I. Co.*, 93 U. S., 326, 335.

Mr. Bishop says: "It would seem sufficiently plain in principle, that if an infant wife has executed a voidable conveyance with her husband, the two can confirm it by executing a fresh conveyance in like terms after she becomes of age. And it has been held, and in principle is equally plain, that *by no act short of the conveyance which the statute provides for, can she make the confirmation during her coverture.* 2 Bishop on Mar. Wom., § 522.

We do not see how it can be consistently held that a married woman is not estopped by fraudulent representations when

she executes a deed, nor by standing by in silence while valuable improvements are being made upon her property, but may yet be estopped by her mere omission or neglect to disaffirm her deed.

This "rule of property" to which the learned judge refers is to be found in the case of *Scranton* v. *Stewart*, 52 Ind., 94, the opinion in which was announced while the case at bar was pending in the court below. The material facts of the case may be thus briefly stated: The appellant Arabella Scranton, on the 2d day of March, 1864, being then married and under age, joined her husband in a conveyance to George W. Stewart of certain land which she had inherited from her father. The consideration was $2,500, one-half of which was paid to her husband before Mrs. Scranton became of age, and the other half afterwards, and it was invested by him in other property taken in his own name. The land was wholly unimproved. Stewart took immediate possession, cleared off a portion, paid the taxes and the purchase-money notes as they matured. On the 22d day of July, 1870, she gave Stewart notice of her disaffirmance of the deed, and shortly after, and while her husband was still living, brought her action in the Ohio Circuit Court against him and his tenant to recover the land. Stewart in his answer, among other things, set up in bar of the action by way of equitable estoppel, the record of a former suit of Mrs. Scranton against her husband, wherein she had obtained a judgment against him for $1,855, and also obtained certain personal property to the amount altogether of the purchase price of the land. But this matter of estoppel seems to have been disposed of in this peculiar and summary way: Upon the filing of Stewart's plea, Mrs. Scranton instituted another action against her husband to annul the former judgment on the ground of fraud. Her husband appeared, confessed the fraud, and the former judgment was so annulled on the same day her complaint was filed. It was further urged, as matter of equitable estoppel that Mrs. Scranton had resided within six miles of the land from the time she arrived at age up to the commencement of her action, and during that time had frequently seen Stewart, and knew he was paying her husband the balance of $1,250 due on the purchase, and failed to inform him of her intention to disaffirm. There was a verdict and judgment against her and she appealed.

The record seems to be full of error; improper evidence was admitted; improper instructions were given, and proper instructions were refused, in the court below. Of course the judgment was reversed; and the court fully recognizes the rights of Mrs. Scranton in the land, holding that she was not only entitled to recover the land, but that she was under no obligation even to restore the purchase money she received.

It will be observed that Mrs. Scranton brought her action while still under coverture. The appellant delayed her suit longer, but still brought it within the time prescribed by the statute of limitations. Mrs Scranton's deed was executed after the enactment of the code of 1852. Hence her rights must be determined under that code, while the appellant's must be determined under the statutes of 1843. But upon the questions raised, there is no substantial difference in the laws of 1843 and those of 1852.

The questions presented in the Scranton case are stated by the court (p. 88) to be: "1. Is the deed of an infant married woman void? 2. Was the appellant required, after she arrived at the age of twenty-one years and while she remained under coverture, to disaffirm her conveyance to the appellee; and if she was, did she, within a reasonable time, disaffirm such conveyance? 3. Are the facts recited in the thirteenth or fifteenth instructions [setting up the matters of equitable estoppel as above stated] sufficient to estop the appellant from disaffirming her said conveyance and recovering back the real estate in controversy?" The court, Buskirk, J., lays down these salutary rules to be observed in passing upon the first question:

"It has been repeatedly held by this court, that *the capacity of a married woman to convey her real estate is the creature of statute law;* and that, to make her deed effectual to convey her lands, the forms and solemnities prescribed by the statute must be pursued. *The statute imperatively provides that the wife cannot encumber or convey her lands, except by deed, in which her husband shall join.* The separate deed of the wife or the husband is absolutely void, and neither passes the title, nor creates an equity in favor of the grantor."

But we think it will be found the court has not strictly observed the rules thus stated. For, proceeding, it is said: "at the time the deed in question was executed, the appellant was both

a *feme covert* and an infant. The infancy of the plaintiff presents a distinct question from that of her coverture. Each disability must be considered by itself, and neither can derive any additional force from being coupled with the other. Under our statute, a *feme covert* cannot convey her lands unless her husband joins with her in the deed, and unless the deed is executed in the mode prescribed by the statute; and when a deed is thus executed, the disability of coverture is removed, and that of infancy alone remains. The deed of a married woman is void when the statutory requirements are not complied with. The deed of an infant, whether married or unmarried, is not void but voidable merely."

Now, in reaching the conclusion that the deed of an infant married woman is voidable merely, it is apparent the court must have either disregarded the underlying principle that the capacity of a married woman to convey her land is the creature of statute law; also the statutory provision in substance that a married woman having reached her majority may convey, &c. The statute was not referred to.

The language of the court is unfortunate. It seems absurd to say that the disability of coverture is *removed* when the wife executes a deed in the mode prescribed by the statute. The actual removal of her disability is generally understood to be accomplished only by the death of her husband or by her divorce *a vinculo*. But from what follows we infer that the meaning of the learned judge, is that, upon the execution of such deed, her disability is so far removed that she will thereafter be subject to estoppel by her conduct—her words, acts or silence. He merely paves the way for the application of the doctrine of equitable estoppel to the conduct of a wife, and proceeds: "Upon a careful review of the authorities and upon full consideration, it was held in Law v. Long, *supra*, that an infant *feme covert* who had made a conveyance of her lands during infancy was required to disaffirm such conveyance within a reasonable time after arriving at full age. The well defined distinction between laying the foundation to bring an action and the actual bringing of the action, as laid down in *Potter* v. *Smith*, 36, Ind. 231, was reaffirmed. We think the appellant was required to disaffirm her conveyance within a reasonable time after she arrived at age. The appel-

lant, within three years and a half after arriving at age, gave to the appellee written notice that she disaffirmed the contract. This was a proper mode of disaffirming. Entry is not required. The notice of the disaffirmance must precede the bringing of the action. *Law v. Long, supra* Was the notice given in a reasonable time? (p. 92)

The court thinks it was, and proceeds to say that an examination of the authorities will show "that the time required ranges from one to twenty years, according to the peculiar circumstances of each case, and the views of different judges and writers."

To illustrate the working of the rule here laid down we will suppose an infant wife absolutely coerced by brute force into affixing her name to a deed in due form, conveying her entire estate, the property and proceeds of the sale passing beyond her control. If the deed is executed after the enactment of the Indiana Code of 1852, no examination of the wife, separate and apart from her husband, indeed no acknowledgment whatever by her is required; *Hubble* v. *Wright*, 23 Ind. 322; *Scranton* v. *Stewart*, *supra*. This ancient safeguard for her protection is entirely broken down, and there appears to be nothing to prevent the employment of force of any kind Suppose she is thus compelled to surrender possession of her property and to remove to a distant state, where by the same influence that procured the execution of the deed she is compelled to reside for over twenty years. She desires and intends all the time to reclaim her property, but considers her first duty to be to avoid discord in her family. She is then relieved of the incubus by the death of or divorce from her husband, and immediately seeks to reclaim her property. She had considered it her first duty to avoid discord in her family, so far as possible. Now, in order to preserve harmony in the domestic circle, the policy of the law has heretofore been to protect fully the property rights of the wife, without requiring of her any positive independent action, while so under coverture. In *Miles* v. *Lingerman*, 24 Ind. 77, although it is assumed erroneously, as we think, that the deed of an infant wife is voidable merely, still it is held that the law, on grounds of public policy, in order to preserve the harmony of the marriage relation, requires of her no disaffirmance of her deed during her coverture.

The Indiana code in pursuance of this policy declares that where the disability exists when the cause of action occrues, she may bring her action within two years after the disability is removed. One method, if not the usual method, of disaffirming her deed is by bringing her action. In any event such disaffirmance requires of her positive and independent action. Notices must be served on the purchaser; a demand for possession should be made; her acts should in some way clearly indicate her title to or claims upon the land, and all her conduct thereafter should be consistent with such disaffirmance. Relying upon the statute giving her two years after disability removed, within which to bring the action, she sues to recover her property. The court says to her: It is true you can bring your action within the time the statute allows, and your claim upon the property seem to be just, but for twenty years after you became of age, while living with your husband—and it may have been thirty or fifty years, for husbands often live a very unreasonable length of time—you have neglected to disaffirm your deed. You ought to have disaffirmed twenty years ago, and acted consistently with such disaffirmance ever since, and thus laid the foundation of the action which the law allows you to bring *now*. It is true such acts of disaffirmance would have been futile, and productive of no tangible results except, perhaps, a lifetime of family discord. Yet, this is the *foundation* of an action to recover property thus unjustly and illegally wrested from you, while an infant wife.

But we need not pursue the illustration further. Such acts of disaffirmance clearly would be just as likely to engender discord in her family as the bringing of her suit; and the same considerations of public policy which would excuse her from bringing her action during her coverture, will excuse her from such action or conduct, as may be required in the disaffirmance of a deed. 2 Bishop on Mar. Wom. pp. 516, 522.

It is a familiar rule that when one is rightfully in possession of personal property not his own, the owner must make demand and there must be a refusal to surrender before he can maintain replevin or trover. So when a person is rightfully in possession of real estate, having entered under a voidable deed or by the license or consent of the owner, a notice to quit must be given by the owner, or a demand for possession be made and a refusal,

before the person thus rightfully in possession is placed in the wrong and the foundation laid for an action of ejectment. This notice or demand is a formal, technical, but yet reasonable requirement of the law, applicable alike in cases of ejectment as well as in many cases of trover and replevin. The reason for the requirement has been well stated in an early case in Indiana, *Clawson* v. *Doe*, 5 Blackf., 300, wherein the Court says: "The action of ejectment is an action of trespass, and the defendant is always regarded by the plaintiff as a trespasser. Hence, where an individual is in the possession of land with the permission or acquiescence of the owner, a suit cannot be sustained against him for the possession without a notice to quit, or until there be a demand of possession and a refusal, or until he be guilty of some other act which will make him a wrong-doer." *Doe* v *Abernethy*, 7 Blackf., 447. We cannot find that any court or text-writer has ever before gone further than to say that her disaffirmance should precede the bringing of her action; and no reason for this is apparent except merely to acquaint the purchaser or his tenant with her claims, and thus afford him an opportunity to surrender the property and avoid the expense of litigation. And some courts hold that no notice or act of disaffirmance is necessary prior to bringing the suit; that the action itself is sufficient; *Greenwood* v. *Coleman*, 34 Ala., 150.

It seems utterly inconsistent for the court to hold that "the statute imperatively provides that the wife cannot encumber or convey her lands except by deed in which her husband shall join," and then immediately proceed to point out another method, viz.: equitable estoppel, by which she may be divested of her title. But the erroneous foundation of the principles announced will be found in holding that this doctrine of equitable estoppel is applicable to a wife under such circumstances. The Court proceeds:

"It is settled by the adjudged cases in this court, that a married woman may be estopped by matters *in pais*. *Gatling* v. *Rodman*, 6 Ind., 289; *Peck* v. *Hensley*, 21 Ind., 344; *Law* v. *Long*, 41 Ind., 586. * * * The doctrine of estoppel *in pais* rests upon a reasonable and just foundation. For the prevention of fraud, the law will hold a party to be concluded by his own act or admission. * * * . To estop a minor from disaffirming a conveyance, on arriving at full age,

some act must have been done, or there must have been some omission, after reaching majority, which would work injury to the person in possession under the color of title, rendering the disaffirmance a fraud upon him. *Miles* v. *Lingerman*, 24 Ind., 385. The omission of the appellant to give notice of her intention to disaffirm could not amount to a fraud upon appellee, if she did not know of the indebtedness, and if appellee knew of the infancy of the appellant, and was not induced to pay such purchase money by the acts of the appellant." (pp. 94, 96.)

We may remark that, as to the *decision* of the case before the Court, no complaint can justly be made. Perhaps more than simple justice was done to Mrs. Scranton in restoring her property and allowing her, also, to keep the consideration she received therefor. But, curiously enough, the application of the rules announced deprives the appellant of her property even though she offers to restore the consideration which *her husband* received. And this too when the two ladies are in precisely the same situation in respect to their property rights. The only possible difference is that the appellant has delayed her action longer, but as she has still disaffirmed the deed and brought her action within the time prescribed by the statute of limitations, this difference does not appear material. Hence there must be some essential vice or defect in the supposed rules thus promulgated.

To say that a wife must disaffirm, notwithstanding her coverture, can only mean that by her neglect or failure to disaffirm by her mere silence during her coverture, she is *estopped* from disaffirming her deed and bringing her action within the time allowed by the statute of limitation; that the Court will determine what is this reasonable time regardless of the statute. And in this case the Court and the statute are at variance. The statute has said she may have two years after disability has been removed, and she has disaffirmed and brought her action within that time. The Court holds that time unreasonable. The only ground on which he could so hold is that by her silence and inaction during coverture, she is equitably estopped from disaffirming and asserting her rights. And he applies this doctrine of estoppel, notwithstanding her coverture, in deference to what he considers a rule of property in Indiana to be gathered from the dicta in *Scranton* v. *Stewart*. The fundamental error, and

one underlying the entire opinion, seems to be in assuming that the doctrine of equitable estoppel is applicable in such case, after the infant wife becomes of age, although her coverture continues

Law v. *Long*, 41 Ind., 586, referred to in support of this doctrine, was an action to obtain an *assignment of dower*. The same learned Judge delivered the opinion of the Court. The *decision* of the case was upon the technical point that the law required a demand for dower before commencement of the action. No formal demand had been made and hence the action failed. Mrs. Long's *right* of *action*, of course, only accrued upon the death of her husband owning the property. To say that she must disaffirm her deed within a reasonable time after she becomes of age, although her husband be still living, is to say that *she may release her right of dower by matter of equitable estoppel*. And this seems to be the view of the Court as derived from the voluminous *dicta* of the opinion. It seems absurd in the face of a statute pointing out the only method by which a wife's dower may be released, but perhaps it is consistent with the *dicta* in *Scranton v. Stewart*, that a wife may be divested of her title to land by matter of estoppel *in pais*, while her husband is still living.

Now, it was successfully urged in the court below, that the principles thus announced in *Scranton* v. *Stewart* had become rules of property in Indiana, which the learned Judge of the Federal Court was not at liberty to disregard. This Court has said:

"Where rules of property in a State are fully settled by a series of adjudications, this Court adopts the decisions of the State Courts. But where private rights are to be determined by the application of common law rules alone, this Court, although entertaining for State tribunals the highest respect, does not feel bound by their decisions." *Chicago* v. *Robbins*, 2 Black, 418.

We do not think the rules announced in *Scranton* v. *Stewart* can be said to be settled by a series of adjudications. They appear rather as mere *dicta*, as the views and observations of that court in elucidation of supposed commonlaw rules. Although reluctantly acquiesced in by the learned Circuit Judge, they seem clearly repugnant to three important provisions of the State laws.

1. In holding the deed voidable merely, and not void, the Court would seem to disregard the provision of the statute law that "INFANTS may not alien lands nor any interest therein." 2 Gavin & Hord, Ch. 37, § 2, p. 256. An *infant wife* is clearly not in the class of persons thereby enabled to convey. Hence, in reason, and by the weight of authority, such deed would be void.

2. In holding that a woman who is under the two co-existing disabilities of coverture and infancy when her cause of action accrues, that is, when her deed in form is executed and possession of her property surrendered, must disaffirm that deed within a reasonable time (said to be one to twenty years) after she becomes of age, notwithstanding her continued coverture, the court cannot have due regard to the letter, spirit or intent of the saving clause of the statute of limitations, which gives her two years after her disability is removed, however long that time may be, within which to bring her action. A husband may live much more than twenty years after his wife has become of age. Indeed, some have been known to live to celebrate their golden wedding, 50 years after their wives became of age; and this without suspicion (at least until *Scranton* v. *Stewart* appeared) that by living so long they might possibly imperil the property rights of their wives.

3. In holding that a wife may be estopped from asserting her rights, and thus be divested of her interest in land by matters of estoppel *in pais*—even by her mere passive silence—the court forgets that it had previously been said that "the statute imperatively provides that the the wife cannot encumber or convey her lands except by deed in which her husband shall join."

These three important provisions of Indiana statute law seem to have been wholly ignored—not construed—by the learned Judge who announced the opinion in *Scranton* v. *Stewart*. If the principles announced be considered rules of property in that State, it follows that the judicial department has usurped the legislative, and may make or nullify laws at pleasure. We see no escape from this conclusion.

But the Supreme Court of that State could not rest long under such imputation. Accordingly that high tribunal has taken the first opportunity to set itself partially right. It has

since been heard from on the last point above mentioned, and will be, no doubt, on the others when they are duly presented. The *dicta* in *Scranton* v. *Stewart* was acquiesced in only by a divided court; it has since been utterly repudiated and swept away by a unanimous court. With it is swept away, we think, the entire foundation on which the decree in the court below is based. The State Court now takes the broad ground that a married woman cannot be divested of her title to land by matters of estoppel *in pais*; by her conduct, acts, or passive silence. We may be excused for referring to the case at some length, as it seems to us decisive of the case at bar.

In *Behler* v. *Weyburn*, 59 Ind., 143, an action by Mr. Behler to recover certain real estate of Weyburn, the Circuit Court gave the jury the following charge, to which plaintiff excepted: "8th. If you find that the plaintiff knew that the strip of land in dispute belonged to her, and she also knew that the defendant was ignorant of her right or title to the same, and that she stood by and knew that the defendant was erecting valuable improvements upon said premises, in good faith and under the belief that the same belonged to him, then she is estopped now to claim the land, although she was a married woman at the time." There was a verdict and judgment for defendant in the Circuit Court, and the plaintiff appealed.

The Supreme Court, Worden, J., held this charge erroneous, and after referring to the statutory provisions restricting the power of the wife over her real estate, proceeds: "It is thus seen that a wife has no power to encumber or convey her lands otherwise than by deed, in which her husband shall join. Under such a statute, the courts cannot, as we think, say that a married woman may divest herself of the title to her land by an *estoppel in pais*. That would be overturning the statute, which prohibits all modes of encumbering or conveying her land, save the one provided for. The same question was involved in the case of *Lowell* v. *Daniels*, 2 Gray, 161, in which the opinion so well expresses our views that we make the following quotation from it. The Court said: 'This raises the material question at issue between the parties, whether a married woman and her heirs may be barred of her estate by an estoppel *in pais*. She can make no valid contract in relation to her estate. Her

separate deed of it is absolutely void; any covenants in such separate deed would be likewise void. If she were to covenant that she was sole, was siezed in her own right, and had full power to convey, such covenants would avail the grantee nothing. She could neither be sued upon them nor estopped by them. The law has rendered her incapable of such contract, and she finds in her incapacity her protection; her safety in her weakness. * * * And we think a married woman cannot do indirectly what she cannot do directly; cannot do by acts *in pais* what she cannot do by deed; cannot do wrongfully what she cannot do rightfully. She cannot by her own act enlarge her legal capacity to convey an estate. This doctrine of estoppel *in pais* would seem to be stated broadly enough, when it is said that such estoppel is as effectual as the deed of the party. To say that one may, by acts in the country, by admission, by concealment, or by silence, in effect do what could not be done by deed, would be practically to dispense with all the limitations the law has imposed upon the capacity of infants or married women to alienate their estates. * * * No case at law has been cited, nor have we found one, in which it has been held that the estate of a party has been barred by an estoppel *in pais*, who was incapable of conveying by deed. And though the courts have liberally applied the doctrine of estoppel *in pais* to cases of personal property, in the transfer of which no technical formalities intervene to protect its application, we know of no case in which it has been applied to a party incapable in law of making a contract.'

So, also, in the case of *Todd* v. *The Pittsburg, Fort Wayne and Chicag R. R. Co.*, 19 O. S., 514, the Court said in reference to a similar question: 'During her coverture she had no power to bind herself by contract. No agreement of hers for the conveyance or encumbrance of her real estate, however solemnly entered into, could be enforced by a decree for specific performance. She could only dispose of or encumber it in the mode prescribed by the statute. * * * And what she could not deprive herself of by direct and express contract with the defendant, we think it clear that she could not lose by the indirect method of an estoppel *in pais*, arising from facts such as those found in this case.' See also, the case of *Glidden* v. *Strupler*,

52 Pa. St., 400. * * * There are probably other cases in our reports following *Gatling* v. *Rodman, supra*, in which there are dicta, and perhaps decisions, at variance with the conclusions in this case, but so far as they conflict with the decision herein, they must be overruled.'" And to the same effect still later cases; *Unfried* v. *Heberer*, 63 Ind., 67, 72; *Richards* v. *O'Brien*, 64 Ind., 418.

These cases leave the doctrine of equitable estoppel in Indiana as it exists in other States, whatever may have been the former *dicta* or decisions of her Supreme Court. To apply these principles to the present case: If the appellant's deed of May 28th, 1847, be considered merely voidable, still, having been under the disability of coverture when her right of action accrued, she had the time which the limitation laws of the State gave her within which to assert her rights, and could not be divested of her title or interest in the land by matters of equitable estoppel. The statute having enabled a married woman to convey her land only by joining with her husband in a deed, it follows that she could only be divested of her rights or interest therein by such conveyance. Even if it is true, as alleged, that she misrepresented her age at the time the instrument was executed, or stood by while valuable improvements were being made, she is not thereby estopped from disaffirming her deed; nor by her long silence, neglect, omission to disaffirm, or give notice of disaffirmance thereof. While under such disability the law requires of her no independent action, and declares that her words, conduct, silence or neglect to act, shall in no way prejudice her rights within the time fixed by statute for her to assert them. She has asserted them within that time, and hence ought to recover her property.

We have only to add in conclusion: The farm in question was a gift to the appellant from her father, one of the early pioneers of Laporte county, Indiana. It was intended to aid her in supporting his four younger children, who were at the same time confided to her care. Her father then went away, and never returned. After that, she had no relatives near, whose advice she could ask. She was an uneducated country girl, then unfortunately linked in marriage to an unworthy husband, and was left wholly under his influence and control. In her evidence the curtain of her domestic life is only just slightly drawn, so that a mere glimpse is revealed. How her signature was obtained to the deed, and to the falsehood written thereon, we leave for the

court to determine in view of the evidence and all the surrounding circumstances. It was manifestly not a difficult thing to accomplish. The outrage was perpetrated upon her; in some way she was induced to execute the instrument purporting to convey her land, and to yield up the possession thereof. Whatever money was paid went directly into the hands of her husband and was lost to her. Since then she has been deprived of the means of fulfilling the trust which her father had imposed upon her; she has struggled on, in poverty and misfortune, and has steadily and faithfully endeavored to do her whole duty towards her younger brothers and sisters thus sacredly confided to her keeping, as well as to sustain the added burdens of her own family. And what a struggle! The Court can appreciate it to some extent, perhaps, but not fully, from the meagre glimpse of her domestic life disclosed in the evidence.

Counsel say that twenty-three years elapsed before any attempt was made by her to disaffirm the transaction. During all that time, fighting alone the wolf from the door of her little ones, hampered and fettered by one whose duty it was to assist her, but who neglected his duty and even added to the weght of her heavy burdens—is any further explanation wanted ofithe long delay? The law accepts this explanation as abundantly sufficient. Having freed herself from his influence and control, she comes to the bar of this Court within the time which the law prescribes, and asks the restoration of the property of which she has been so long unjustly deprived.

The time will soon come when she cannot ply her needle. As age creeps on and her eyes grow dim, she will need help from some source; and if, under the rules of law and equity, she is entitled to this little property, as we have endeavored to show, we feel assured the Court will very cheerfully award it, and it will yet come to bless her in her failing years.

We respectfully submit that the decree ought to be reversed.

ARTHUR D. RICH,

CHICAGO, April, 1880. *Of Counsel for Appellant.*

OFFICE SUPREME COURT U. S.
FILED
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D. W. MIDDLETON, Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1879.

No. 271.

ANNA M. SIMS

vs.

WM. EVERHARDT, ET ALS.

APPEAL FROM UNITED STATES CIRCUIT COURT FOR INDIANA.

APPELLEE'S BRIEF.

EDWIN B. SMITH,
W. H. CALKINS,
Of Counsel.

Judd & Detweiler, Printers.

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APPELLEE'S BRIEF.

Statement.

This is a bill in equity, brought by Mrs. Sims to recover possession of land in La Porte county, Indiana, upon the ground that she was a minor when she joined her husband in a conveyance of it to the appellees' testatrix, thirty-three years ago.

The dates material to the understanding of this cause are below, briefly and chronologically stated, for convenient reference in the course of this discussion.

We will, for the sake of the argument, assume it to be proved that—

Anna M. Graham was born September 25, 1828.

She married John B. Sims July 4, 1844.

The land in dispute was conveyed May 28, 1847.
Mr. and Mrs. Sims separated in 1863 or 1865.
They were divorced, upon her libel, February 14, 1870.
Process in this cause was served February 25, 1872.

Before delivery of the deed, and to induce acceptance of it and payment of the consideration, Mrs. Sims declared in a writing below its acknowledgment that she became of age September 25, 1846. The deed was delivered and the price paid upon the faith of this statement, and Mrs. Everhardt thereupon entered into possession, cleared off the incumbrance, paid all subsequent taxes, and remained in undisturbed enjoyment of the estate until her death, in 1871, and it has since been occupied by her executors and devisees, the appellees.

Mrs. Sims took no steps to notify her grantee of the falsity of the statement made by her as to her age upon the deed until the spring of 1870, after her divorce, when, through her counsel, Mr. Flagg, she notified Mrs. Everhardt that she disaffirmed the deed made and delivered by her twenty-three years before, because of her having been in fact a minor at the time of its execution.

Brief.

No brief has as yet been filed by the appellant, but the near approach of the time for the cause to be called will not permit us to delay ours longer. The brief used by her counsel in the court below is in our hands, and it is supposed to indicate the line of argument which will be pursued.

In the framing of the bill, as well as in the brief, the disabilities of infancy seem to be confounded with those of coverture. At least, there is a strenuous effort made to combine them.

As to the power to convey, if the law recognizes any distinction between an infant married and one unmarried, it

confers the greater power upon the former. Certainly, the incapacity to convey by reason of immaturity of years and of judgment is not *increased* by coverture; though that status may require the observance of particular *forms* of conveyance and the joinder or assent of the husband.

I.

1. The deed of an infant is merely voidable, and not void, whether the minor grantor be single or a *feme covert.*

This is the general rule at common law, (Zouch *v.* Parsons, 3 Burrows, 1794, 1805), recognized in this Court (Tucker *v.* Moreland, 10 Peters, 58; Irvine *v.* Irvine, 9 Wall., 627) and in the several States. See 3 Washburn on Real Prop., *559, note 6, citing Phillips *v.* Green, 3 A. K. Marshall, 11; Webb *v.* Hall, 35 Maine, 336, and many other cases.

It is sufficient, however, that it has been repeatedly so declared by the highest courts in Indiana. Doe *v.* Abernathy, 7 Blackf., 442; Hartman *v.* Kendall, 4 Ind., 403; Pitcher *v.* Laycock, 7 Ind., 398; Johnson *v.* Rockwell, 12 Ind., 77; Chapman *v.* Chapman, 13 Ind., 396; Miles *v.* Lingerman, 24 Ind., 385; Law *v.* Long, 41 Ind., 586, 595; and Scranton *v.* Stewart, 52 Ind., 68, 86, *et seq.*, which fully disposes of *every* issue in the present case. This decision was reached and announced by the supreme court of Indiana since the cause at bar was first determined in the court below, and led to the judgment finally entered. It is recent, and has not been overruled or qualified by any later case.

2. But that the highest Indiana tribunal had otherwise construed their statute, we should have supposed the deed of an infant *feme covert*, in which her husband joined, good and effective.

By marriage, guardianship is terminated. Such is the

common-law rule, also declared expressly by the statute law of Indiana. (McPherson on Infants, *114, top.)

The Indiana Rev. Stats. of 1843, c. 35, sec. 102, declares that "the marriage of any female, under guardianship as a minor, to any person of full age, shall operate as a legal discharge of her guardianship, *in like manner as if she had arrived at full age.*" The act of June 9, 1852, c. IV, sec. XII, omitted the words italicized (in force at the time of the execution of this deed) and added, "and her guardian shall account to the husband of the ward in the same manner as if she had arrived at full age."

2 Gavin & Hord's Comp., 568.

See, also, 2 Rev. Stats. of 1876, pp. 591–592, part fourth, ch. 4, sec. 12.

The supreme court of Indiana held that guardianship being thus terminated, an infant female, married to a man of full age, can have no guardian.

State *vs.* Joest, 46 Ind., 235; Ex. p. Post, 47 Ind., 142.

Under the common law and the Indiana statutes, the husband took the place of the guardian.

Such being his position, it would seem, had that court given no different construction, that the Rev. Stats. of 1843, p. 417, Part 2, Art. 2, ch. 28, sec. 17, empowered a married woman of any age to unite with her husband in making title. That section reads thus: "Sec. 17. The joint deed of the husband and wife, upon complying with the provisions of the fortieth section of this chapter [relating to the mere *form* of executing the deed] shall be sufficient to convey and pass the real estate of the wife, but not to bind her to any covenant or estoppel therein."

It is sufficient for our purpose, however, that the supreme court of Indiana have held that this section authorized a

minor wife to join in a conveyance which would not be void, but only liable to be avoided by her within a reasonable time after attaining her majority.

Scranton *v.* Stewart, 52 Ind., 91, citing Bool *v.* Mix, 17 Wend., 119; Bronson, J.

Webb *v.* Hall, 35 Maine, 336; Shepley, C. J.

Phillips *v.* Green, 3 A. K. Marshall, 7; and many other cases.

II.

Being only voidable and not void, it was incumbent upon Mrs. Sims to avoid it within a reasonable time after becoming of age if she desired to do so at all; and a period of twenty-one years is an unreasonable time for the exercise of this power. (Hartman *v.* Kendall, 4 Ind., 403; Law *v.* Long, 41 Ind., 599, citing numerous cases, especially Bool *v.* Mix, 17 Wend., 119; Scranton *v.* Stewart, 52 Ind., 68, 88, *et seq.*, also citing many cases, to which we refer.)

Some positive act of disaffirmance is required; silence is affirmance. (See above cases, and also Doe *v.* Abernathy, 7 Blackf., 442; Babcock *v.* Bowman, 8 Ind., 110; Dearborn *v.* Eastman, 4 N. H., 441; Robbins *v.* Eaton, 10 N. H., 561; Emmons *v.* Murry, 16 N. H., 385; Wallace *v.* Lewis, 4 Harr., 75; Hastings *v.* Dollarhide, 24 Cal., 195, and many other cases referred to in these.)

That such act of disaffirmance must be done within a reasonable time, see the above cases. Also Irvine *v.* Irvine, 9 Wallace, 627–8, where four years is called a long time, as it was held sufficient evidence of ratification in Wallace *v.* Lewis, 4 Harr., 75; so was six years in New Hampshire, 10 N. H., 561; 16 N. H., 385; and nine years in New York, 11 John., 539; Richardson *v.* Boright, 9 Vt., 368, 371, bottom; Kline *v.* Beebe, 6 Conn., 494; Wheaton *v.* East, 5 Yerger, 41. Hartman *v.* Kendall, 4 Ind., 403, declares thirteen years to be an unreasonable delay.

The decisions hold that the question, what is a reasonable time, must be answered by the peculiar circumstances of each particular case. Hastings *v.* Dollarhide, 24 Cal., 195, bottom, together with other cases above cited and authorities *passim.* Jenkins *v.* Jenkins, 12 Iowa, 195; Stout *v.* Merrill, 35 Iowa, 56; State *v.* Plaisted, 43 N. H., 413, &c. &c.

In this connection it is that we rely upon the statement of Mrs. Sims, subjoined to the deed. We never supposed an incapable person could make his deed effective by merely averring capacity; but the deliberate averment of a fact known to him and not known to his grantee must operate to shorten the period within which it would be reasonable to permit him to avoid his deed by proof of a different state of things from that so averred.

The *fact* that after 1851 Mrs. Sims *might* have brought suit without joining her husband is also an element to be considered, as well as the further fact that they finally separated eight years before the divorce, and he was away in the army before that, so that she was free from the influence of his presence. She lived but three hours' ride from the land, and was twice in La Porte.

We will admit, if you please, she was not bound to *sue* while covert, but she was bound to *disaffirm.* (52 Ind., 92–3.)

The disaffirmance is a preliminary act, a fact vital to be proved and to be *seasonably* performed. Delaying the suit will not extend the time for its performance. (Ib., Bool *v.* Mix, 17 Wend.)

As she obtained the consideration paid by false pretences, it might well be held that she would be barred by an acquiescence extending throughout the time when she would have been liable to indictment therefor.

Neither in civil or criminal procedure is it a *conclusive* (but only a *prima facie*) presumption, that a woman acts under the coercion of her husband. The facts in this case rebut that presumption; certainly after 1861.

The fact of coverture does not excuse an act of positive fraud, such as signing the false statement appended to this deed. "While the law of Indiana gives to married women rights superior to those which they enjoy in some of the other States, it has not released them from the obligations of good faith and common honesty." (Litchenberger *v.* Graham, 50 Ind., 290, close of opinion.) In that case her silence was held a ratification of her husband's sale of her personal property.

A fortiori, then, will active participation in the husband's fraud greatly shorten the time for disaffirmance, if it does not estop her altogether from repudiating the contract, (Gatling *v.* Rodman, 6 Ind., 289; Barnes *v.* McKay, 7 Ind., 301.)

III.

Attention is called to the character of the present proceedings.

It is not ejectment to recover possession. It is a bill in chancery, brought *not* to avoid the deed, but upon the assumption that it was void *ab initio*. It assumes that the title is and always has been in the complainant, and seeks merely to remove a cloud from that title, upon the ground that it was created through a fraudulent conspiracy against her, in which the deceased grantee was a participant! Such is the equity which she sets out to establish, as void of support in the evidence, as to its facts, as it is in the law under the Indiana decisions.

Since 1852, if not before, the real estate of a married woman has been her separate property.

This Court has always possessed the general chancery power to protect such separate estates, unaffected by State legislation, (Noonan *v.* Lee, 2 Black, 499,) though the State Legislature might declare what should constitute such separate estate.

Ever since 1852, then, if no earlier, Mrs. Sims has been empowered to file in the Federal or State courts of chancery the precise bill she now does, and could have made her husband a party defendant. This is in addition to, and entirely distinct from, the right to sue at law given by the State statutes. It is incident to the chancery jurisdiction of this Court. Not to have resorted to it before is such laches as will bar her of recovery now.

IV.

Though the chancery *power* of the Federal courts cannot be conferred nor restrained by State legislation, yet in its exercise this Court will recognize the rules of property established by such legislation and by judicial construction of it, and will construe a contract agreeably to the effect given it by the *lex loci contractus*. (See Fairfield *v.* Gallatin Co., No. 526, of the current term, and the many decisions there cited.)

Under the Indiana statutes, the deed in question was not void; nor was it absolutely and unconditionally voidable. It passed the present title upon delivery, and became absolute and unimpeachable unless avoided within a reasonable time.

Though her declaration could not operate to bar a seasonable action of ejectment, it may be held an estopple in these proceedings in equity. Bispham, Principles of Equity, 356, 357, § 293; 2 Story Eq. Jur., c. XLIV, especially § 1545, and cases there cited.

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